Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

Harry R. Hibbs, Jessica Hibbs,
Henry Holiday, Petitioners

v.

City of San Buenaventura, Respondent

On Petition For a Writ of Certiorari
To The Court of Appeal of
the State of California
Second Appellate District, Division Six

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A city council specially assessed the owners of 299 homesites $2,735,003.83 ($9,147.17 per homesite) to pay 75% of the cost of clearing each homesite's easement of debris deposited thereon by public drainage systems serving 7,799 acres. The lower courts confirmed the special assessment using city council's administrative record and the standard of judicial review for special assessments mandated by the Supreme Court of California in *Dawson v. Town of Los Altos Hills*, 16 Cal.3d 676 (1976) ("*Dawson*"). It provides with emphasis added:

> **A special assessment** finally confirmed by a local legislative body in accordance with applicable law **will not be set aside by the courts unless it clearly appears from the face of the record before that body,** or from facts which may be judicially noticed, **that the assessment** as finally confirmed **is not proportional to the benefits to be bestowed on the properties to be assessed or that no benefits will accrue to such properties**.

Dawson, supra, at 685. The questions presented are:

1. Does the standard of judicial review for special assessments mandated by the Supreme Court of California in *Dawson* violate the Fifth Amendment's Takings Clause made applicable to the States by the Fourteenth Amendment?

2. Is the Due Process Clause of the Fourteenth Amendment satisfied where a city council imposes a $2,735,003.83 special assessment on 299 homesites after only providing each homesite owner with the opportunity to "protest" by speaking to city council for no more than five minutes?

LIST OF PARTIES

The parties seeking review are Harry R. Hibbs, Jessica Hibbs and Henry Holiday (collectively, "Petitioners" or "Hibbs").

In addition to Petitioners, the parties to the proceeding in the court whose judgment is sought to be reviewed were Petitioner, Henry Holiday's deceased wife, Viola Holiday, the City of San Buenaventura ("Respondent" or "city"), and the following parties who may be affected by review because their homesites are subject to the same special assessment and their separate actions to overturn the special assessment were consolidated with Petitioners' and are included in the judgment for which review is sought: Alvin & Marjorie Aggen, Robert & Kathy Ajeman, Joseph & Claire Anthony, Marvin & Cynthia Bates, David & Debbie Bayer, June Berssen, Michael & Sharon Bick, Jay & Leslie Braun, James & Christine Caldwell, Peter & Elaine Cannon, James & Suzanne Clark, Anthony & Antonia Colitti, Bill & Jean Crew, James Culbertson, Donald E. & Patricia Cunningham, Robert & Ruth Davidson, Michael & Barbara Dunmire, James Eisenhart, Bert & Mary Fickerson, Ralph & Mary Lou Fonzo, Desiree Domingo-Foraste, Joe Hallam, Dave Harris, Larry & Sandra Hartley, Stan Heirshberg, Diane Becker Heirshberg, Steven & Karen Hoffberg, Thomas & Drusilla Horton, George & Linda Johnson, George Kukuchek, Ted & Marty Lapadakis, Proodos Properties, Inc., Nelley Mac, James & Nora Majewski, Mike & Denise Malloy, Richard & Dorothy Massa, Dale E. & Harriette McCoig, William & Barbara McCord, Irwin R. & Susana Miller, Marge Ann & Gary M. Minkiewicz, Pat & Madeleine Modugno, Edward & Annette Myck, Gary & Corinne Nishida, Malcolm M. & Arlene Oakes, Bob Plemon, Jewell Plummer, Marshall & Diane Resnik, Raymond Rieman, Charles & Sharilyn Roark, Berle & Patricia Rush, Gary Shelford, Robert Starr, Diane Starr,

Jerome Styskal, John & Joyce Trahan, William & Alison Veit, Pearle Wehmeyer, Mark & Barbara Wellisch, David & Betty Welsh, Laurice & Eleanore West, Helen Flynn Westerbrook, Bud & Billie Whitehead, the Whitehead Family Trust, Harvey & Marian Wilson, David & Diane Wyman, Albert & Dorothy Young (collectively, "Aggen et al"); and Fling Traylor, Annette Traylor, Russell Thomas (collectively, "Traylor et al").

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PETITION FOR REVIEW

Petitioners, Harry R. Hibbs, Jessica Hibbs, and Henry Holiday, respectfully petition for a writ of certiorari to review the judgment entered in this case by the Court of Appeal of the State of California, Second Appellate District, Division Six ("Court of Appeal") on federal constitutional grounds only.

OPINIONS BELOW

The opinion of the Ventura County Superior Court ("Superior Court") is unreported and set forth in full in the Appendix ("App.") at pages 1a-46a. The opinions of the Court of Appeal are unreported and fully set forth in the Appendix at pages 47a-70a.

JURISDICTION

The judgment of the Court of Appeal was entered on June 19, 1997 (App. 47a, 67a). The Court of Appeal denied Petitioners' timely Petition for Rehearing and slightly modified its judgment on July 18, 1997 (App. 69a-70a). The Supreme Court of California DENIED Petitioners' timely Petition for Review on September 3, 1997 (App. 71a). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment to the Constitution of the United States made applicable to the States by the Fourteenth Amendment (emphasis added):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; **nor shall private property be taken for public use, without just compensation.**

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States (emphasis added):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law** which shall abridge the privileges or immunities of the citizens of the United States; **nor shall any State deprive any person of** life, liberty, or **property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Background Facts.

The Ventura Keys ("Keys") is a small exclusively residential neighborhood located adjacent to the north-west terminus of the Ventura Marina. The Keys was developed in the early 1960's by Pacesetter Homes with private funds for private profit. It features the 299 residential homesites

which are the exclusive subject of the special assessment in question here.

The 299 specially assessed homesites are located adjacent to man-made waterways ("Keys' waterways") privately constructed by Pacesetter Homes out of solid ground in the early 1960's. In total square footage the homesites vary from 3,900 square feet to 6,500 square feet; in total waterfront frontage from 35.78 lineal feet to 137.10 lineal feet. Each homesite holds an exclusive easement to dock boats over a portion of the waterway adjoining it ranging from 9.5 lineal feet to 146.6 lineal feet and a non-exclusive ingress and egress easement for boats over the Keys' waterways to the Ventura Marina (collectively, "the homesites' easements"; individually, "each homesite's easement").

By deed recorded in 1964, Pacesetter Homes dedicated the fully completed Keys' waterways to the city encumbered by each homesite's easement. The city accepted this conveyance with one reservation (emphasis added):

> Said City of San Buenaventura by acceptance of this deed **reserves all of its rights and privileges which it now has or may hereinafter have under applicable laws to levy and impose** taxes, **assessments**, permits and other charges against the land to which said parcel 'A' [the Keys' waterways] is adjacent or any parts or portions thereof, for the maintenance or control of the lands transferred to said City hereby.

The Ventura Marina is immediately adjacent to the Keys' waterways. It is a publicly owned man-made marina located on the California coast between Oxnard and Santa Barbara. It was constructed with public funds out of solid land in the early 1960's.

Before the Ventura Marina was built, the city used the Arundell Barranca to funnel and dump storm and run-off water collected by public drainage systems serving around 7,000 acres directly into the Pacific Ocean.

Since construction of the Ventura Marina, the city has used the Arundell Barranca to funnel and dump storm and run-off water collected by public drainage systems serving 7,799 acres directly into the Ventura Marina. The new dumping off point for the public drainage systems' debris is located one-half mile short of the Pacific Ocean where the Ventura Marina's "stub channel" joins the Keys' waterways.

2. The Special Assessment.

The silt, mud and debris the public drainage systems dump into the Ventura Marina's "stub channel" is 99.7% of all the material which must be removed from the Keys' waterways by dredging. Absent this material, the Keys' waterways would need to be dredged once every 2,000 years. As it is, the Keys' waterways must be dredged once every seven years; otherwise the drainage systems' debris clogs the Keys' waterways to the point where most boats cannot use them; thereby destroying each homesite's easement.

The special assessment in question was solely imposed by city's council to pay 75% of the cost of dredging the Keys' waterways every seven years.

Over an avalanche of written protests filed by the owners of some 84% of the 299 homesites and a fire-storm of protests, on September 25, 1991, the city's council used a special assessment act adopted by the State Legislature to specially assess the 299 homesites for 75% of the cost of dredging the Keys' waterways. No other properties were so specially assessed.

For 1991 alone, the special assessment was $2,735,003.83 allocated $9,147.17 to each and every homesite regardless of its square footage, waterfront frontage, or exclusive dock easement.

Before the city's council imposed the special assessment it conducted a "protest hearing" at which each homesite owner was only allowed to "protest" the proposed special assessment by speaking to the city's council for no more than five minutes. Oaths were not administered; testimony was not taken; evidence was not received. The homesite owners were not allowed to examine or cross-examine witnesses or rebut the presentation the city's staff and paid for experts made to the city's council after it closed the "protest hearing" to the public.

3. The Lower Court Proceedings.

Inter alia, Petitioners' complaint filed against the city asked the Superior Court to overturn the special assessment against their homes for the city's alleged violations of the Takings Clause of the Fifth Amendment made applicable to the States by the Fourteenth Amendment ("Takings Clause Violations") and/or the city's alleged violations of the Due Process Clause of the Fourteenth Amendment ("Due Process Violations").

The Superior Court consolidated Petitioners' action to set aside the special assessment against their homes with actions separately filed by other property owners to set aside the special assessment against their homes (collectively, the "Validation Actions"). It also stayed all proceedings on Petitioners' inverse condemnation action against the city pending final determination of the Validation Actions. The stay is still in effect.

The Superior Court "tried" the Validation Actions from

the "city's Administrative Record" using the standard of judicial review for special assessments mandated by the Supreme Court of California in *Dawson, supra*, 16 Cal.3d 676, 685, to wit:

> A special assessment finally confirmed by a local legislative body in accordance with applicable law will not be set aside by the courts unless it clearly appears on the face of the record before that body, or from facts which may be judicially noticed, that the assessment as finally confirmed is not proportional to the benefits to be bestowed on the properties to be assessed or that no benefits will accrue to such properties.

App. 22a.

The Superior Court found that evidence of an increase in the value of the specially assessed properties was not required to uphold the special assessment (App, 25a); rather, California law only required the city's council to make a finding of special benefit, which it did (App. 27a-29a).

The Superior Court further found that even if the administrative record proved the city used the Keys' waterways as a "garbage dump" for the public drainage systems, the Superior Court could not overturn the special assessment on this ground (App. 30a).

The Superior Court rejected Petitioners' claim that the special assessment should be overturned on federal Due Process grounds (the Fourteenth Amendment). It found that due process in special assessment proceedings only required "notice of a hearing to protest the assessment and an opportunity to be heard upon protest" (App. 46a).

Accordingly, the Superior Court confirmed the special assessment as to all parties (App. 46a).

In the Briefs and Request for Rehearing Petitioners filed with the Court of Appeal, they pressed their claims that the special assessment should be set aside for violations of the federal constitution, to wit, violations of the Takings Clause and the Due Process Clause, and each of them. Among other things, in support, Petitioners cited the Court of Appeal to this Court's recent decisions of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) ("*Dolan*"); and *Nollan v. California Postal Comm'n.*, 483 U.S. 823 (1987) ("*Nollan*").

The very same Court of Appeal this Court OVERTURNED in *Nollan* confirmed the Superior Court's finding that the applicable scope of judicial review for special assessments was the "very narrow" scope of judicial review mandated by the Supreme Court of California in *Dawson, supra*, 16 Cal.3d 676, 685 (App. 52a-53a). It did so without mentioning *Dolan* or *Nollan* or addressing the federal constitutional issues Petitioners' Takings Clause Violations raised (App. 52a-70a).

The Court of Appeal found the special assessment must be upheld because Petitioners failed to prove the city council's finding of "special benefit" was "arbitrary, capricious, or lacking in evidentiary support" (App. 55a). In the Court of Appeal's opinion, it could not "reweigh the evidence or draw conclusions different from that of the City Council" (App. 59a).

With respect to the federal constitutional issues Petitioners' Due Process Violations raised, the Court of Appeal found that due process in special assessment proceedings does not require "the administration of oaths, the cross-examination of witnesses, and the exclusion of

hearsay evidence" (App. 66a). It further found that it was required to presume the city complied with applicable law (App. 65a).

Accordingly, the Court of Appeal confirmed the Superior Court judgment and upheld the special assessment as to all parties (App. 67a). Thereafter, it denied Petitioners' timely Request for Rehearing (App. 70a).

In their timely Request for Review to the Supreme Court of California, Petitioners focused particular attention on the federal constitutional issue of whether the standard of judicial review for special assessments mandated by the Supreme Court of California in *Dawson, supra*, 16 Cal.3d 676, 685, violated the Takings Clause of the Fifth Amendment made applicable to the Sates by the Fourteenth Amendment and this Court's recent decisions of *Nollan, supra*, 483 U.S. 825, and *Dolan, supra*, 512 U.S. 374.

The Supreme Court of California DENIED Petitioners' Request for Review, without comment, on September 3, 1997 (App. 71a).

REASONS FOR GRANTING THE WRIT

1. The Issues are of Vital Importance to the Nation.

The exclusively federal constitutional issues this case presents are of vital importance to each and every governmental agency purporting to have the power to impose special assessments AND to each and every property owner purportedly subject to that power. Until this Court affirmatively resolves the issues presented here -- one way or another -- the lower courts will be required to decide the same constitutional issues over and over again without this Court's guidance.

Further, granting this petition will provide this Court with the opportunity to answer questions left unanswered in its recent decisions of *Nollan, supra*, 483 U.S. 825, and *Dolan, supra*, 512 U.S. 374, AND resolve the conflicts JUSTICE O'CONNOR and JUSTICE THOMAS found so troubling in their dissent to this Court's decision to not hear the issues presented to it by *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995).

Perhaps most important of all, there is an urgent and pressing need for review. The courts of the most populous state in the nation are steadfastly and relentlessly using a standard of judicial review which violates the Constitution of the United States and the decisions of this Court to determine the validity of exactions imposed as special assessments.

2. California's Standard of Judicial Review for Special Assessment Exactions Violates the Takings Clause of the Fifth Amendment, as Incorporated Against the States by the Fourteenth Amendment and this Court's Decisions of *Nollan* and *Dolan*.

In the recent past this Court has made one thing crystal clear. Government cannot avoid the requirements of the Takings Clause by making findings which are only supported by platitudes and half-hearted analysis. Where a governmental exaction can result in a violation of the Takings Clause, government is required to support that exaction with an individual determination which satisfies the "essential nexus" test promulgated in *Nollan, supra*, 483 U.S. 825, and the "rough proportionality" test promulgated in *Dolan, supra*, 512 U.S. 374. Where government fails to satisfy these requirements, the exaction simply does not pass constitutional muster (*Nollan, supra; Dolan, supra*).

California's courts have somehow failed to get this Court's constitutional message when it comes to special assessments. This case is just one of many examples. The California courts have steadfastly upheld an exaction effected as a "special assessment" where the local legislative body calls the exaction a "special assessment", makes a finding of "special benefit", and conducts a "protest hearing." See for example, *Knox v. City of Orland,* 4 Cal.4th 132 (1992), wherein the Supreme Court of California upheld a special assessment for park maintenance even though it was imposed only against residential units at the uniform rate of $24.00 per unit and no consideration was given to the residential unit's size, location, or proximity to a park. *Id.* at 151.

Had the city imposed the same exaction in question here on the Pacesetter Homes as a condition to its development of the Keys, the exaction would clearly violate the Takings Clause. The "essential nexus" required by *Nollan, supra*, 483 U.S. 825, and the "rough proportionality" required by *Dolan, supra*, 512 U.S. 374, are both fatally lacking.

First, with respect to "essential nexus"; the Keys' development did not cause the problems the city has encountered since the public drainage systems started dumping their debris in the Ventura Marina's "stub channel." The public's construction of the Ventura Marina created those problems. Without question, the problems would have existed with or without the Keys' development. If anything, it can be argued the Keys' development helped ease the city's existing public drainage problems by providing it with more room to temporarily store the drainage systems' debris.

Second, there is no "rough proportionality." The burden the 299 additional homesites imposed on public drainage systems serving 7,799 acres is not roughly

proportional to the burden the city imposed on the 299 homesites by requiring the owners thereof to pay 75% of the cost of removing debris emanating from public drainage systems serving 7,799 acres.

The question thus presented is: Does an exaction which violates the Takings Clause when imposed as a condition to the grant of a land use permit fail to violate the Takings Clause when imposed as a special assessment?

To Petitioners, the answer is obvious. Absolutely not. An exaction which violates the Takings Clause when imposed as a condition to the grant of a land use permit likewise violates the Takings Clause when imposed as a special assessment.

The Fifth Amendment's prohibition against taking private property for public use is all encompassing. It provides "private property [shall not] be taken for public use, without just compensation" (Fifth Amendment, Takings Clause). Any reading of the Takings Clause which excludes special assessments from its embrace is not only inconsistent with the clear import of the Takings Clause; it is inconsistent with one of the principal purposes of the Takings Clause.

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed **to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole.**

Armstrong v. United States, 364 U.S. 40, 49 (1960); emphasis added.

In *Armstrong, supra*, 464 U.S. 40, this Court held the

Taking Clause applied where a state lien held by a private boat builder was made unenforceable by the transfer of the property subject to the lien (boats) to the United States Government (*Id.* at 41-49). If this is so, the Takings Clause must also apply to special assessments.

Nonetheless, in California, it appears fair to say that -- with the blessing of its courts -- a governmental agency can obtain whatever money it wants -- off budget -- by a special assessment without regard to the requirements of the Takings Clause.

It is time the California courts faced constitutional facts. The standard of judicial review the Supreme Court of California mandated for special assessments in *Dawson, supra*, 16 Cal.3d 676, 685, violates the Takings Clause. Rather than barring Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole (*Armstrong, supra,* 364 U.S. at 49); it INVITES GOVERNMENT TO FORCE some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole.

The conclusion is inescapable. The standard of judicial review the Supreme Court of California mandated for special assessments in *Dawson, supra*, 16 Cal.3d 676, 685, is facially unconstitutional AND unconstitutional as applied in this case for the reasons given by this Court in *Nollan, supra*, 483 U.S. 825, and *Dolan, supra*, 512 U.S. 374.

3. The Special Assessment Violates the Fourteenth Amendment's Due Process Clause.

The Fourteenth Amendment's Due Process Clause makes clear its provisions embrace all actions taken by the

State, -- executive, legislative, judicial, administrative, or whatever -- so long as the State's action deprives a person of property without due process of law.

In this case the city's council used an existing law to deprive the owners of 299 select properties of their property ($2,735,003.83) without first providing them with notice and a fair and meaningful hearing appropriate to the circumstances. In so doing, the city's council violated the Due Process Clause of the Fourteenth Amendment as surely as if it had simply picked the specially assessed property owners' pockets. See for example, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Bell v. Burson*, 402 U.S. 535, 542 (1971); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972); *Tulsa Professional Collection Services, Inc. v. Pope*, 488 U.S. 478, 484-491 (1988); *Chicago Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897).

4. The Court of Appeal's Decision is Outrageously Wrong.

Each homesite's easement is private property (*Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). The city "took" that private property for public use the moment the public drainage systems' debris drifted onto the homesites' easements. *Id.* at 180. It thereby incurred a constitutional obligation to pay just compensation for that take. *Id.* at 180; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). There is no question about that. Of the entire bundle of property rights protected against a take for public use without just compensation, the right to "exclude" is perhaps the best recognized. (*Kaiser, supra*, at 180-181).

The city's council compounded and exasperated the

city's take of the homesites' easements ("first take") when it specially assessed the 299 homesites 75% of the cost of removing the public drainage systems' debris from the Keys' waterways AND the homesites' easements by dredging. By so doing, the city's council effected a second take from the homesite owners at least equal in amount to the amount the city's council specially assessed the 229 homesites ($2,735,003.83 for 1991 alone).

It is this second take (the special assessment) which is the subject of this litigation. It is far more deadly and reprehensible than the first take. It not only takes private property (money) under the pretext of a lawful special assessment in violation of the Takings Clause; it forces the victims of the first take to pay the lion's share of the cost of removing the very debris which resulted in the first take from their private property. Perhaps worse, there is nothing to say that the city's council can not or will not use the same special assessment procedure to force the specially assessed property owners to pay all or a part of the just compensation eventually awarded them for the first take.

Two takes do not relieve the city from the requirements of the Taking Clause. That is precisely what we have here. Two separate, interwoven takes effected by the same city on the same homesite owners. Had the city not effected the first take (dumping debris on private easements); it would not have effected the second take (imposing the special assessment to remove that debris). It may sound silly, but this case is as simple as that.

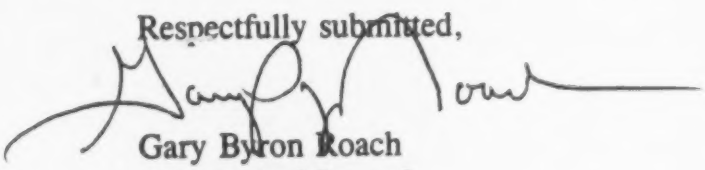
The Court of Appeal failed to recognize the second take (the special assessment) for what it was: an exaction imposed by the city's council in violation of the Takings Clause to force the very victims of the first take to pay for removing debris dumped on their private property for public use. Instead it validated the special assessment, and thereby

turned the Takings Clause upside down and backwards. The decision not only fails to pass constitutional muster; it is outrageously wrong.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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FILED
DATE: MAY 02, 1996
SHEILA GONZALEZ, Superior Court
Executive Officer and Clerk
By Jan Weaver, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA
* * * * * * *

ALVIN AND MARJORIE AGGEN, et. al. Petitioners and Plaintiffs, v. CITY OF SAN BUENAVENTURA, and DOES 1 through 100, inclusive, Respondent and Defendant. AND CONSOLIDATED ACTIONS.	)	Case No. 118395 Lead Case (Consolidated With Case Nos. 118544 and 119484 [1st through 4th causes of action] STATEMENT OF DECISION

The Court has reviewed all Petitioner's and

Respondent's filings, arguments of counsel as presented September 17, 1993, post hearing briefs of counsel, proposed statements and judgments, objections and responses thereto, and arguments of counsel from the hearing of June 9, 1995.

Based thereon, the Court states as follows:

SUMMARY OF DECISION

The consolidated Petitions for Writ of Mandate are denied. Porto Bello Benefit Assessment District No. 91-1 was lawfully formed and the properties located within the District have been properly assessed. The Resolutions and determinations of respondent City of San Buenaventura are supported by the Administrative Record, and there are no other legal impediments to the formation of the District.

INTRODUCTION

1. Property and Waterways. Very generally, these cases concern storm water runoff into certain manmade waterways at the shore of the Pacific Ocean. The waterways are navigable small-boat channels constructed as part of a development of a single family residential subdivision known as the Ventura Keys. The runoff has deposited silt and debris into the channels. The channels have been dredged several times over their 30 year history, and further dredging is needed at this time.

2. Lawsuits. The City of Ventura and subdivision residents are at-issue over who should pay for the dredging. In 1991, the City of Ventura formed a special assessment district for the purpose of assessing dredging costs to the subdivision properties, i.e., the homes with frontage on the channels. Certain subdivision property

owners have filed petitions for writs of mandate against the City to invalidate the special assessment district.

In addition, subdivision property owners have filed civil complaints against the City seeking damages as a result of the siltation. These latter matters are based on tort theories and inverse condemnation and are not subject to this Decision or Judgment thereon.

3. Procedural Status of Lawsuits. There are three mandate petitions which have been consolidated and are referred to as the Aggen cases. The five complaints for damages have also been separately consolidated and are called the Adams cases. The Adams civil complaints are at issue. No trial has been set.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY:

1. Keys Subdivision. The Ventura Keys subdivision was created in 1964 and consists of 299 residential lots and five lots dedicated as two public beaches. Several navigable channels were constructed as part of the subdivision. Each residential lot has frontage on one of the channels, and an appurtenant easement giving the property owner the exclusive right to dock boats in the portion of the channel abutting the owner's lot. The general public has the right to use the beaches and navigate boats through the channels.

2. History of Arundell Barranca. At some point in time, the Arundell Barranca was a ravine or gorge which carried mud, silt and other debris from the mountains to the ocean when it rained. The mud, silt and other debris carried down the Barranca was deposited into the ocean at the point where the Ventura Keys subdivision now exits. The Arundell Barranca, however, was not the

only drainage channel in the area, and the Keys channels were not the only ocean outlet for storm waters.

As the City of Ventura and other parts of Ventura County developed, the Arundell Barranca continued to serve as a drainage "system", (whether natural or manmade) for the City and some other areas of the County. With development came construction of storm drains and other structures which constituted manmade drainage facilities. The status of the Barranca may have been altered, which is not an issue before the Court in this proceeding.

3. **Recent Drainage and Siltation**. Regardless of a natural or manmade status, the Barranca continues to empty into the ocean at the Keys channels. This has caused major siltation problems in the channels over the years, and at the present time. Petitioners contend that the Keys channels function as a "debris basin" for the Arundell Barranca and City storm drains.

4. **1964 Maintenance District**. The City of Ventura and the original Keys developers anticipated that the Keys channels would require some maintenance including occasional dredging. Therefore, as a condition for approval of the Keys subdivision, the City required the formation of a "maintenance district," the 1964 Port Bello Maintenance District, under the Municipal Improvement Act of 1911. [Streets & Highways Code Sections 5000 et seq.].

The 1964 District consisted of the Keys property. Property owners were assessed about $35 per year for channel maintenance, including dredging. The 1964 District, however, only had an "active life" from 1964 to 1979. In 1979, the 1964 District was not formally dissolved, but assessments stopped and the District was

informally abandoned.

5. **1991 Assessment District**. After the 1964 District ceased to operate in 1979, the City dredged the channels a couple of times with federal money. Later, it appears that the siltation was simply allowed to build up over time.

By 1991, however, the siltation problem had become serious. In response, the City formed the District, formally known as the "Porto Bello Benefit Assessment District No. 91-1." The District was formed to specially assess the Keys property to obtain the money to dredge the channels.

DEFINITIONS:

"Aggen," "Traylor," and "Hibbs"--the individual petitioners in the three now-consolidated Aggen cases.

"AR" -- Administrative Record.

"Channels," or "Keys channels" -- navigable waterways constructed as part of the Ventura Keys subdivision.

"District," or "1991 District" -- Porto Bello Benefit Assessment District No. 91-1 formed in 1991.

"Engineer's Report" -- report by Willdan Associates commissioned by City in connection with formation of District.

"Keys," "Keys property," "Ventura Keys" -- residential subdivisions which forms the boundaries of the assessment district which is the subject of this lawsuit.

"Rev & Tax Code" -- Revenue and Taxation Code.

"S & H Code" -- Streets and Highway Code.

"1964 District" -- Porto Bello Maintenance District formed in 1964 under the 1911 Act.

"1911 Act" -- Municipal Improvement Act of 1911, Streets & Highways Code Sections 5000 et seq.

"1913 Act" -- Municipal Improvement Act of 1913, Streets & Highways Code Sections 10000 et. seq.

The next two (2) major sections set forth this Court's understanding of the positions of petitioners and respondents. Citations to statutory or case law or the Administrative Record are the parties, not the Courts, and are provided to show the authorities upon which the parties substantially relied. The court's Conclusions begin at page 21.

SUMMARY OF PETITIONERS' POSITIONS:

1. Maintenance Dredging Is Not An "Improvement" Under 1913 Act.

The District was formed to dredge the already existing Keys channels. Dredging is a maintenance function which is not permitted under the 1913 Act. The 1913 Act permits the legislative body to "install" various facilities [See S & H Code Section 10100 for a list of permitted facilities], but the S & H Code does not list "maintenance" of these facilities as an authorized improvement.

S & H Code Section 5821 [incorporated into the 1913 Act by S & H Code 10108] permits an assessment district

to cover the cost of "... maintaining and operating any or all of said improvements or any or all other improvements such as are permitted to be constructed herein...." The foregoing language, however, limits permitted maintenance to maintenance of facilities constructed as part of the assessment district. In other words, the District's assessment may include maintenance of district-installed facilities, but there is no provision for creating a district to maintain facilities which were not installed by the District.

Although later dedicated to public use, the channels were not constructed with money raised under the 1913 Act. The channels were constructed by a private developer with private money; they were not installed by the legislative body.

2. <u>The City Must Prove The District Levies A "True" Special Assessment</u>.

Prop 13 requires voter approval of "special taxes" for specific purposes, but there is no voter approval requirement for special assessments levied by special assessment districts. "True special assessments designed to directly benefit the real property assessment and to make it more valuable are exempt from Proposition 13." [*Solvang Municipal Improvements v. Board*, (1980) 112 Cal.App.3d 545; see also *Beaumont Investors v. Beaumont-Cherry Valley* (1985), 165 CA3d 227; *Bixel Associates v. City of L.A.* (1989) 216 Cal.App.3d 1208].

a. For an assessment to be a "true" special assessment, the assessed property must receive a "special benefit" in the form of a direct monetary benefit from the improvements financed with the assessment. [See e.g. *Spring Street v. L.A.* (1915) 170 Cal. 24; *Solvang*,

supra].

b. The City should have the burden of proving the purported special assessment is a "true" special assessment because (1) Proposition 13 "constitutionalized" the "special benefit" standard, (changed it from a statutory to a constitutional requirement), and (2) attempts to circumvent Proposition 13 are common and must be strictly scrutinized. [See *Beaumont Investors v. Beaumont-Cherry Valley*, *supra*, 165 Cal.App.3d 277; Rider v. San Diego (1991) 1 Cal.4th 1; *Bixel v. L.A.*, *supra*, 216 Cal.App.3d 1208].

c. Since the City is so quick to claim Prop 13 as the motivation for the District, the court should make sure the City isn't circumventing Prop 13. The case law distinguishing between a "special assessment" and a "special tax" is particularly important. [*Rider* and *Beaumont*, *supra*, and *Fresno v. Malstrom* (1979) 94 Cal.App.3d 974].

3. The District Is Invalid Since Property Owners Get No "Special Benefit" From the Assessment.

Case law defines "special benefit" as including the following essential elements: (a) the improvements must directly benefit the assessed properties, and not merely create a general benefit to the public as a whole, (b) the assessed property must receive a direct monetary benefit from the improvements, and (c) the direct monetary benefit to the property cannot exceed the special assessment. All three are essential. [Spring Street Co. v. L.A., supra, 170 Cal. 24; Roberts v. L.A. (1936) 7 Cal.2d 477; L.A. v. Offner (1961) 55 Cal.2d 103; Harrison v. Board (1975) 44 Cal.App.3d 852].

a. <u>There is No City Finding of Special Benefit</u>.

City Resolution 91-90 states that properties in the District "receive a local and direct benefit from the works of improvement." [AR 2780, 2782A]. This is insufficient. Even if the facts would support other findings, other findings were not made. The court cannot substitute its judgment for that of the City, or assume the Council persons who voted for the District would have done so if they knew a specific finding of a special benefit was required.

Also, the Engineer's Report lists benefits to the Keys property, but doesn't say the benefits "specially" benefit the Keys property. The benefits were enhanced ability to use docking easements on channels, clear access to harbor, enhanced living environment and land values [AR 2652]. But the Engineer's Report does not say how the Keys property owners would lose these benefits without the dredging.

b. <u>The District Is A Subterfuge For Taking Property Without Just Compensation</u>.

Keys residents are not "beneficiaries" of the dredging. They are victims of City conduct. The dredging will remove silt dumped in the channels by a public drainage system which benefits other areas of the City. Like any victim of a nuisance, the Keys residents will benefit from the abatement of the nuisance, but removal of harm is not a true benefit. Intentional discharge of silt into the Keys channels through publicly-maintained drainage systems constitutes a taking of property. There are legal differences between surface water and flood water. Instant water is surface water (storm water runoff). Intentional discharge of surface water is inverse condemnation, and triggers right to compensation. [<u>Yue v. City of Auburn</u> (1992) 3

Cal.App.4th 751].

c. The 1991 District Is An Attempt To Shift The City's Duty To Maintain Dedicated Waterways.

Since the channels were dedicated to the City, the City has an obligation to maintain them as public property. [Clay v. L.A. (1971) 21 Cal.App.3d 577; Ellison v. Ventura Port District (1978) 80 Cal.App.3d 574]. The shifting of the financial burden of maintaining the channels from the City to the Keys residents cannot be called a "benefit" (much less a special benefit) to the Keys residents.

4. Creation of 1964 District as a Condition of Subdivision Approval does not Permit Unrestricted City "Dumping" into Channels.

It is conceded the City correctly argues that the formation of the 1964 District was a condition of the Keys project and dedication of the channels. In fact, for several years the City assessed Keys residents for the 1964 District, and the assessments were used for dredging; but this condition does not give the City an unlimited right to dump debris into the Keys channels "for free." The condition does not permit the City to foist "unforeseen" costs onto Keys residents. The 1964 District assessments were about $35, whereas the 1991 District assessment is at least $1,622.

a. The City did not interpret the 1964 District's purpose this way until the current issues arose. Either the 1964 District was not envisioned to include remedying the siltation problem caused by using the Channels as a debris basin for public drainage systems, or the siltation problem has greatly exceeded what was envisioned in 1964.

b. The City did not attempt to form a new improvement district in 1974 when it was determined that the assessments for the 1964 District could not be increased.

c. In effect, the City's new interpretation of the condition constitutes a "secret" authorization to pass costs onto Keys residents without notice to them, and (1) a secret condition is not a valid exercise of police power, and (2) a secret condition is another way to damage private property without compensation [Salton Bay Marina, Inc. v. Imperial Irrigation District (1985) 172 Cal.App.3d 914].

d. Finally, the 1991 District was not the condition for City approval of construction of the subdivision; the 1964 District was that condition. Keys residents have fulfilled all obligations under the 1964 District which continues to exist.

5. Formation of 1991 District Violates Rev & Tax Code 2263(2).

a. 1964 District And 1973 Legislation.

The 1964 District was created under the 1911 Act to pay for dredging and otherwise maintaining the Keys channels. In 1972, the assessment was $45/year. In 1973, the Legislature enacted property tax relief legislation prohibiting any increase in assessments above 1972 levels (except with voter approval). [See Rev & Tax Code Sections 2201, 2206, and 2260, et seq].

When the 1973 legislation was enacted, the City obtained opinions from the Attorney General and Legislative Counsel that the City's assessment increase from $45 to over $600 was illegal under Rev & Tax Code

Section 2263(2). The City then rescinded the increase, and abandoned the Keys channels (except for dredging which could be accomplished with money from the federal government) until creation of the 1991 District.

b. <u>The 1991 District Violates Rev & Tax Code Section 2263(2)</u>.

The 1991 District is a transparent attempt to circumvent the 1973 [Rev & Tax Code Section 2263] limitation on increases in the amount of assessment by districts (except with voter approval). Although the 1964 District and the 1991 District were formed under different statutes, there was no change in the special benefit to the Keys property. The 1991 District and 1964 District are the same thing with different labels. [See Rev & Tax Code Section 2215 which defines "special districts" so as to apply both to "maintenance districts" under the 1911 Act and "assessment districts" under the 1913 Act].

Also, no new improvements were constructed or created by the 1991 District. The 1991 improvements are the same as those covered by the 1964 District. More specifically, what was called "maintenance" under the 1964 District (dredging) is called "improvements" under the 1991 District. The City is playing word games to get out from under the restrictions of Rev & Tax Code Section 2263.

c. <u>Proposition 13 Did Not Render The 1964 District Useless</u>.

As indicated above, the 1964 District was rendered ineffective in 1973 by passage of Rev & Tax Code Sections 2201, 2206, and 2260, et seq. It was not rendered ineffective by Proposition 13. The City's argument that Prop 13 destroyed the effectiveness of the

1964 District is wrong. If Prop 13 rendered the 1964 District ineffective, the 1991 District would "likewise be affected." If the benefits are the same, the Prop 13 impact should be the same. If mere creation of a new district under 1913 Act were sufficient to avoid the statute, the statute would be avoidable whenever a municipality wanted to avoid it.

6. Flawed Adoption Procedures Invalidates The Ordinance.

a. Resolution of Intent/Engineer's Report Approved Too Fast.

The 1913 Act requires the legislative body to, (a) adopt a resolution declaring its intention to order the improvement [S & H Code Section 10200]; (b) retain a "competent person" (an engineer) to make a written report to the legislative body in that resolution of intent; [S & H Code Section 10203]; and (c) the legislative body must adopt the engineer's written report (with or without modifications), and after passing the report, establish a time for hearing property owner protests; [S & H Code Sections 10300 and 10301].

The City retained an engineer (Willdan Associates), and directed the engineer to prepare its report, approved the report, and set the time for the public hearing on protests all on the same day, i.e., at the August 19, 1991 City Council meeting. "Clearly," this is too much too quickly; it could not be in compliance with the 1913 Act.

b. The City Council Ordinances Are Void Because Only "Local and Direct" Benefit Found.

The key requirement of a special assessment district is a "special benefit" to the assessed property.

Resolutions 91-89 and 91-90, however, only state a City Council finding that the properties within the 1991 District "receive a local and direct benefit from the works of improvement." This isn't sufficient to constitute a finding of special benefit.

7. **Engineer's Report Insufficient.**

The Hibbs Points and Authorities include a long list of subjects which the Engineer's Report purportedly did not include. (Hibbs 4-7).

8. **The Court Is Not Limited To The Administrative Record.**

Petitioners are entitled to due process in their Proposition 13 case. This permits, and requires, the court to consider evidence in addition to the Administrative Record.

SUMMARY OF RESPONDENT'S POSITIONS:

1. **Facts.**

It is claimed that as a drainage channel for surrounding hillsides, the Arundell Barranca has been depositing sediment in the area now known as the Keys for decades. The City and the Keys developers both knew that the channels would need periodic dredging, and the 1964 District was formed to assure that the burden of dredging would fall on the subdivision residents, not the City as a whole.

The City required the deed which dedicated the channels to contain a provision reserving to the City "all of its rights and privileges...under applicable laws to levy or impose taxes, assessments, permits and other charges

against the land...for the maintenance and control of the lands ..." so dedicated. Furthermore, the resolution approving the Keys development was expressly conditioned on formation of the 1964 "maintenance" District.

The 1964 District was formed under the Municipal Improvement Act of 1911. [Streets & Highways Code Section 5000]. Under the 1911 Act, the 1964 District levied a "special tax" to defray the costs of dredging. The ability of the 1964 District to increase this special tax was "eviscerated" by the 1973 amendment to Revenue & Taxation Code Section 2201, et seq. Proposition 13 further impaired the capacity of the 1964 District to raise money. The Keys property owners have not contributed to the 1964 District since 1978.

After 1978, the City budgeted limited money for routine channel maintenance, and, on two occasions, the City dredged the channels with money obtained through the federal government.

By 1990, the channels needed to be dredged again. In 1990, the City Council directed the City staff to develop a proposal for creation of an assessment district under the 1913 Act. The City also hired an engineering consultant, Willdan Associates, to prepare a report concerning the proposed assessment district. The engineer's report was prepared ("Willdan Report"). In August and September 1991, the City held public hearings to consider the Willdan Report and formally adopt resolutions creating the District. The final public hearing took place on September 9, 1991.

The District levied an assessment against each of the Keys property owners consisting of assessments: (1) to repay the bonds sold to finance the initial dredging, (2) to

accumulate a sinking fund to finance future dredging.

The City based its approval of the District on its determination that the Keys property owners received a "special benefit" from the project over and above the benefit to the general public. Since the public does make some recreational use of the channels, however, the City determined to contribute 25% of certain portions of the assessments.

2. Dredging And Other Channel Repairs Are "Improvements" Under The 1913 Act.

Petitioners erroneously contend that only the activities set forth in S & H Code Section 10100 are the proper subjects of an assessment district and that dredging is not set forth in that section. In fact, the 1913 Act authorized the public entity to "acquire or install any or all of the works and improvements authorized by" the 1911 Act "or other works and improvements of a local nature." [S & H Code Section 10102]. The 1913 Act defines "install" to mean, "construct, reconstruct, extend, repair, and maintain." [S & H Code Section 10006]. Also, the 1911 Act includes the "reconstruction and repair" of any "work or improvement." [S & H Code Section 5023].

3. The Keys Property Is "Specially Benefitted."

A special benefit to property from an improvement is a benefit over and above that received by the general public. [City of Baldwin Park v. Stoskus (1972) 8 Cal.3d 563, 568]. While the special benefit is often measured in terms of increased market value of the property, some cases uphold special benefit determinations without mentioning market value. [City of San Diego v. Holodnak (1984) 157 Cal.App.3d 759,763]. There may even be a special benefit when the property owner does

not intend to make use of the benefit. [Howard Park Co. v. City of L.A. (1953) 119, Cal.App.2d 515, 519].

a. The City Council's Conclusion Is Supported By The Administrative Record.

The Engineer's Report relied on by the City sets forth numerous special benefits to the Keys properties, e.g., enhanced ability to use boat slips. [AR 2652]. The City Manager's report found special benefit. [AR 2466]. The Project Manager (B. Fosbrink) testified to special benefit. [AR 2527-28].

This evidence is sufficient to justify the City's formation of the District. [Jeffery v. Salinas (1965) 232 Cal.App.2d 29; Jenner v. City Council (1958) 164 Cal.App.2d 490. See also Kalashian v. County of Fresno (1973) 35 Cal.App.3d 43 where far less special benefit was considered sufficient]. Also, where the courts have found no special benefit, the record was devoid of evidence supporting the assessment. [See Harrison v. Board of Supervisors (1975) 44 Cal.App.3d 852].

b. Petitioners' Arguments Have No Merit.

1) There Is No Benefit To City Drainage System. Dredging is not necessary for the City drainage system to function properly. The City Project Manager testified that the drainage system does not benefit from the dredging, or need dredging to operate. Silt would drain into the Keys with or without the dredging and with or without the Keys. [AR 2395].

2) Detriment Is Not Caused By City Drainage System. Petitioners' principal argument is not that the Keys residents will not be specially benefitted, but rather that the siltation was caused by the City's drainage system

and the City should have to pay for what it causes. Not so.

i) First, causation is not relevant to the determination of special benefit. [See Harrison v. Board of Supervisors, supra, 44 Cal.App.3d 852; also, White v. San Diego (1980) 26 Cal.3d 897]. Further, to shift the focus from benefit to cause would wreak havoc with established assessment district law and practice. Deterioration of improvements built by assessment districts is frequently caused by general use by the public. Here, the siltation is "natural". It is caused by natural erosion and local geography.

ii) Second, the City's drainage system has not caused the siltation of the Keys. The Administrative Record includes evidence that the urbanization of the area has decreased erosion. [AR 2519, 2649, 2658, 2661-2668]. And, since the record contains such evidence, the court cannot weigh or consider contrary evidence. [Jeffery v. Salinas (1965) 232 Cal.App.2d 29].

3) No Duty To Maintain Keys. Petitioners contend that the Keys properties receive no special benefit because the City has a duty to maintain the Channels as they existed when the City accepted their dedication in 1964.

First, "duty" is immaterial. A city has the duty to maintain all its streets, but it is clear that a special assessment district may be formed to repair and maintain streets which confer a special benefit on certain property owners. [S & H Code Sections 10102, 5101(0), and 5023; see also Dawson v. Los Altos Hills (1976) 16 Cal.3d 676, where the public entity had a contract duty to handle its sewage discharge, but the court upheld an assessment district to finance the contractual obligation].

Second, the City has no duty to maintain the channels in the same condition as the condition at the time of their 1964 dedication. The channels were dedicated to public use, but this does not require the City to maintain the channels as navigable waterways. [See Wattson v. Eldridge (1929) 207 Cal. 314, for a broad interpretation of a dedication purpose]. Plus, the City made it clear when it accepted the dedication that it was not assuming the financial burden of maintenance [AR 2518].

Petitioner's reliance on Clay v. City of L.A., supra, 21 Cal.App.3d 577 is misplaced since Clay concerned city streets. A City has an independent duty to maintain streets it has accepted into its street system [S & H Code Section 1806] which does not exist with respect to waterways. Also, Clay found that the plaintiff therein had a reasonable expectation of city maintenance. The instant dedication contains no provision which allows any such reasonable expectation.

4) Inverse Condemnation Is Not Part Of This Case.

Petitioners are making an inverse condemnation argument, but inverse condemnation is not at issue in the Aggen mandate case.

5) The City Findings Are Sufficient. The use of the phrase "local and direct benefit" instead of "special benefit" in the city ordinances creating the District is immaterial. There are no required "magic words."

4. The Assessment Is Proportional To Benefit.

The Keys' share of dredging costs must be proportional to the special benefit conferred on the Keys. Since there was some public benefit from the dredging (enhancement of recreational use of waterways), the City Council agreed to pay 25% of the costs to reflect public

benefit. Such allocation is supported in the Administrative Record [AR 2651, 2778, 2879-80]. Petitioners' argument that the City should pay more because the City's drainage system is benefitted fails because the City's drainage system is not benefitted.

5. Correct Procedures Were Followed.

Petitioners' contention that the sequence of events at the August 8, 1991 City Council hearing was fatally flawed is baseless, and not supported by any statutory or case authority. Ordering preparation of the Engineer's Report at the same hearing which preliminarily approved the Engineer's Report is not prohibited by any statute. Also, the argument that deprived the Keys property owners of a third public hearing is without merit since there is nothing in the 1913 Act which requires more than one hearing. [S & H Code Section 10301]. In addition, there was public comment at the August 19, 1991 hearing, two workshops were conducted in September concerning the Engineer's Report, and there was further public comment at the September 9 and 24 hearings.

Finally, ".... No error, irregularity, informality, and no neglect or omission of any officer, in any procedure .." under the 1913 Act "... which does not directly affect the jurisdiction of the legislative body to order the work or improvement, shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder." [S & H Code Section 10012].

6. The District Is Not Dependent On Condition Of Approval Of Keys Development.

Petitioners argue that the City's position is dependent upon the fact that creation of a maintenance district was a condition of the 1964 approval of the Keys subdivision. Not so. The validity of the District stands alone; the

existence of the 1964 District is immaterial. The instant case is distinguishable from Salton Bay Marina v. Imperial Irrigation Dist. (1985) 172 Cal.App.3d 914.

7. The District Is Not Subject To Rev & Tax Code Sections 2201 et seq.

Rev & Tax Code Sections 2201, et seq. apply solely to special districts levying ad valorem taxes. [Rev & Tax Code Sections 2215, 2213]. Also, there is no case law applying the 1973 legislation to special assessment districts. Any limitation on the 1964 District by Rev & Tax Code Section 2263 is immaterial to the 1991 District.

8. Special Assessment Districts Are Not Subject to Prop. 13.

Cases are clear, and unequivocal.

COURT'S CONCLUSIONS:

1. Standard of Review.

a. The Dawson Case is Controlling.

The applicable standard of judicial review is set forth in Dawson v. Town of Los Altos Hills (1976) 16 Cal.3d 676. Dawson is a declaratory and injunctive relief action brought by property owners in a 1913 Act sewer district who claimed that the district was illegal. The court stated that establishment of a special assessment district is a legislative act grounded in the taxing power. A special assessment district is not like other "districts" which have officers, and corporate rights; it is merely the land to be benefitted from the improvements. [16 Cal.3d at 683].

The scope of judicial review of such legislative

actions is accordingly "quite narrow." The local public entity acting as a legislative body "is the ultimate authority which is empowered to finally determine what lands are benefitted and what amount of benefits shall be assessed .... This determination is made after a full hearing accorded to all persons interested to make such objection as they see fit." [16 Cal.3d at 684]. "A special assessment finally confirmed by a local legislative body in accordance with applicable law will not be set aside by the courts unless it clearly appears on the facts of the record before that body, or from facts which may be judicially noticed, that the assessment as finally confirmed is not proportional to the benefits to be bestowed on the properties to be assessed or that no benefits will accrue to such properties." [16 Cal.3d at 685]. See also White v. San Diego (1980) 26 Cal.3d 897, which reaffirms the Dawson standard. The Court has confined its review to the Administrative record before the City and taken Judicial Notice of Deed No. 1084 filed September 21, 1992.

b. Initial Petitioner Response To Dawson.

In various briefs filed petitioners argued that the limited judicial review standard of Dawson was no longer viable because of the passage of Proposition 13. Although petitioners admit, as they must, that special assessments are not limited by Proposition 13, they argue that Proposition 13 "constitutionalized" the special benefit standard for assessment districts. This means, according to petitioners, that courts must strictly scrutinize taxing devices intended to circumvent Proposition 13, and that the public entity has the burden of proving that a purported special assessment is a "true" special assessment. [See Rider v. San Diego supra, 1 Cal.4th 1; Solvang Muncipal Improvements v. Board supra, 112 Cal.App.3d 545; Beaumont Investors v. Beaumont-Cherry

Valley supra, 165 Cal.App.3d 227; Bixel Associates v. City of L.A. supra, 216 Cal.App.3d 1208].

c. **Dawson Reaffirmed By Orland.**

The December 1992 case of Knox v. City of Orland (1992) 4 Cal.4th 132, reaffirmed Dawson, and rejected the petitioners' argument. Knox concerned a park maintenance district established under the Landscaping and Lighting Act set forth in S & H Code Sections 22500, et seq., a statute which parallels the 1913 Act.

In Knox, the Supreme Court addressed the interface between special assessments and Proposition 13 as follows: (1) Proposition 13's tax limitations are not violated by legitimate special assessments, (2) the court will not reevaluate the Dawson standard of review, (3) legitimate special assessments are not "end runs" around Proposition 13, (4) a special assessment is not presumed to be a special tax, and (5) the court's review was confined to the record before the public entity and judicially noticed facts. [4 Cal.4th at 146-147].

The facts in Knox were essentially undisputed. There was no evidence in the record to dispute the public entity's special benefit analysis, and the court considered the engineer's report to the public entity to be conclusive in the absence of contradictory evidence in the record. [4 Cal.4th at 149]. The court, however, touched on the situation where the administrative record contains contradictory evidence. In a footnote, Knox questioned whether a special assessment would be valid under Dawson "... if there exists evidence in the record which contradicts the local legislative body's benefit determination and indicates that such determination was arbitrary, capricious, or entirely lacking in evidentiary support." [4 Cal.4th at 149, fn 26]. This footnote indicates a very

conservative and deferential attitude. In disputed evidence situations, the public entity's determination must be upheld unless the evidence shows that determination to have been "arbitrary, capricious, or entirely lacking in evidentiary support." The petitioners did not carry this burden of proof.

d. Petitioners' Post-Knox Position.

After Knox, the City and two petitioner groups sent letters to the court arguing the impact of Knox. While the petitioners' attempt to distinguish minor aspects of Knox, petitioners essentially, and correctly, concede that Dawson applies.

2. The 1991 District Confers A "Special Benefit" on The Assessed Property Owners.

a. "Special Benefit" Requirement.

The fundamental requirement for a special assessment district is that all property included in the district must receive a special benefit from the public improvement installed by the district. The 1991 District is proper only if dredging the channels confers a "special benefit" on the Keys properties over and above a benefit to the general public. A "general benefit" to the public is not sufficient; a "special benefit" to the assessed property in particular is required. This requirement is undisputed, and is stated in many cases.

1) Spring Street Case. Later cases attribute the origin of the special benefit concept to Spring Street Co. v. City of L.A. (1915) 170 Cal. 24. Spring Street states: "... that the return to the property owner by way of benefit is ... the basic foundation upon which this right [to specially assess] rests, becomes apparent from the

consideration that, if we are not able to say that the owner for the specific charge imposed is compensated by the increased value of the property, then manifestly we have a special tax upon a minority of the property owners, which tax is for the benefit of the public and which tax is special, unequal, and ununiform. Therefore, the compensating benefit to the property owner is the warrant, and the sole warrant...to impose the burdens of the special assessment." [170 Cal. at 30].

2) **"Special benefit" Does Not Require A Quantifiable Increase In Property Value.** Petitioners rely on Spring Street as support for a narrow definition of special benefit which is that the assessed property must receive a direct monetary benefit from the improvements, and the direct monetary benefit to the property cannot exceed the special assessment. (Hibbs 9-10, 14-16). Petitioners almost assert that the public entity must establish a specific monetary figure.

The petitioners' argument is not supported by case law. Increased property value may be an adjunct to special benefit, but the cases do not impose any requirement that the public entity show a direct or quantifiable monetary benefit before a "special benefit" can be established. Cases occasionally use general language regarding enhanced property value to affirm a special assessment district, but the Court cannot find a case which rejected a special assessment district determination on the ground that the public entity failed to show a specific effect on property value. In fact, many cases do not even mention market value. [See Knox v. Orland, supra; Dawson v. Los Altos Hills, supra; Harrison v. Board of Supervisors, supra; White v. San Diego, supra].

In the Case of Howard Park v. L.A. (1953) 119

Cal.App.2d 515, the Court explicitly rejected a market value approach. In Howard, the owner of property used for oil production claimed no benefit from a sewer district because oil property doesn't need sewers at all. In affirming inclusion of the oil property in the district, the court rejected a benefit approach which starts "by ascertaining [a property's] market value before the improvement...and determining its increased market value as a result of the improvement." [119 Cal.App.2d at 519]. The court realized sewers did not enhance the value of the property when used for oil production, but left the property in the district because the key factor was the "total benefit" of the improvements to the district. [119 Cal.App.2d at 519]. The Case of City of San Diego v. Holodnak (1984) 157 Cal.App.3d 759, includes increased value language, but found special benefit merely because the assessed properties would be the primary users of the improvements. [157 Cal.App.3d at 762-763]. The court did not identify any evidence of specific increased dollar value in the administrative record. The Case of Roberts v. L.A. (1936) 7 Cal.2d 477, does not discuss property value. Rather, the court found that street lighting had a "local benefit" because it was confined to part of the city. The court stated that it would be unjust to the general taxpayers to charge them with the entire cost of operation. [7 Cal.2d at 491]. The Case of City of Baldwin Park v. Stoskus (1972) 8 Cal.3d 563 (eminent domain case) shows that the absence of an "exact relationship" between the assessment levied and the benefit received will not invalidate the assessment. It is sufficient if the assessment spreads the cost among benefitted property owners on some equitable, non-discriminatory basis. [8 Cal.3d at 568]. The case of Kalashian v. County of Fresno (1973) 35 Cal.App.3d 43 stated that, in the absence of fraud, gross injustice, or demonstrable mistake, judicial inquiry is limited to determining whether the assessed property will receive "some substantial benefit." [35 Cal.App.3d

at 49]. Finally, in the case of J.W. Jones v. San Diego (1984) 157 Cal.App.3d 745 (related to Holodnak) a "facilities benefit" assessment was imposed on undeveloped property to pay for future public facilities to be used by future residents of the property. A broad spectrum of public improvements was covered including sewers, streets, parks, libraries, fire stations, etc. The court upheld the assessment district.

Most cases uphold public entity determinations of special benefit. Furthermore, the cases involve a wide range of public improvements such as sewers, street lights, parking, street widening, parks, etc. The types of improvements considered appropriate for special assessment districts seem almost all-inclusive.

b. Application of Special Benefit Test To This Case.

1) Special Benefit Undisputable.

The dredging financed by the 1991 District is more closely connected with the specific Keys property than the public improvements in any of the cases cited above. Focusing on the type of improvements considered appropriate for a special assessment district in the case law, "special benefit" is an issue that must be resolved in favor of the City.

The Keys channels are, in essence, the "backyards" of the Keys properties. The Keys properties abut the channels, and Keys residents have exclusive boat docking rights on the channels. The Keys residents will surely receive a special benefit from dredging silt out of their channels. Facilitating the docking of private boats by owners of waterfront property is as far from a general public interest as a public improvement can be.

2) **Based On The Administrative Record The City's Special Benefit Finding Is Sufficient.**

The Administrative Record supports the City's determination of special benefit to the properties included in 1991 District. City Resolution 91-90 states that properties in the District "receive a local and direct benefit from the works of improvement." [AR 2780, 2782A]. This is a sufficient statement of the City's fundamental fact determination of special benefit. Resolution 91-90 does not use the magic words "special benefit," but the phrase actually used, "local and direct benefit," is indistinguishable as a matter of substance. Petitioners quibble over wording, but offer no substantive challenge to the finding. Furthermore, there is evidence in the Administrative Record which supports the fundamental finding of "local and direct benefit." For example, (1) the Engineer's Report lists numerous special benefits to the Keys properties, e.g., enhanced ability to use boat slips, clear access to the harbor, private docking facilities adjacent to the home, protection of property and facilities, enhanced living environment and views, values and aesthetic purposes. [AR 2652]; (2) the City Manager's report reveals special benefits [AR 2466]; (3) testimony by Project Manager Fosbrink includes testimony showing special benefit [AR 2527-28]; (4) testimony by Rodriguez of Willdan Associates also supports the special benefit finding [AR 2517-22, 3080-85].

Petitioners contend that the evidence is equivocal, and fails to hit the special benefit nail directly on the head. But petitioners cite no contrary evidence, and do not undermine the substance of the City's evidence. The Administrative Record includes more that 14 full volumes substantially filled with identical form letters from Keys residents. The letter parallels petitioners' arguments in

their points and authorities, but includes nothing which constitutes material evidence. The principle evidence offered by petitioners is the Lockman Report which provides a weak challenge to the Engineer's Report. Also, the Lockman Report is short, conclusory, and limited in foundation.

Additionally, the evidence in the Administrative Record appears to equal the evidence relied on by courts in upholding other special assessment district determinations. In Dawson v. Los Altos Hills, supra, 16 Cal.3d 676, the court noted that the record consisted of the engineer's report and testimony, comments of individual town council members and statements of protesting property owners. [See also White v. San Diego, supra, 26 Cal 3d 897 for approval of an administrative record containing similar information].

(3) **Petitioners' Argument That Keys Receive No Special Benefit.**

Petitioners direct their main argument to the purported cause of the channel siltation. Petitioners assert that they are victims, not beneficiaries of City conduct. They contend they will receive no special benefit from dredging because the Keys properties did not "cause" the situation which must be dredged out of the channels. The channels fill up with silt and debris because the City uses the channels as a "debris basin" for its drainage system. In short, petitioners want to shift attention from the benefits of dredging the channels to the reasons why the channels need to be dredged.

Unfortunately, petitioners' special benefit argument is not focused. Before evaluating the argument, the court must be able to cogently state the argument. It would seem that the argument may be described in two ways.

(i) **Causation/City Wrongdoing.** Petitioners claim the City is willfully using the Keys as a garbage dump and foisting clean-up costs onto innocent victims. Implicit in the argument is an accusation that the City is damaging the Keys through wrongful conduct. This is a liability argument. The City should pay for the dredging because the City is responsible for the siltation.

This causation/wrongdoing argument, however, has no legal support as a ground to overturn creation of an assessment district, whether or not it has any evidentiary support in the Administrative Record. (See below for further analysis.) In fact, the argument is no more than an introduction of liability issues from the Adams cases into the instant Aggen cases. In effect, petitioners implicitly incorporate the Adams case allegations into the Aggen cases even though the tort and inverse condemnation issues are to be subject of a later trial.

(ii) **"Reverse" Special Benefit.** The petitioners' position may also be portrayed in a less emotional form, a form more closely connected to the "special benefit" test. Implicit in Petitioners' accusations is a contention that the entire City benefits from the dredging because the entire City benefits from dumping its silt in the Keys channels. There is no "special benefit" to the Keys residents; only this general public benefit.

Petitioners argue that the City has a drainage system which carries silt-laden storm water out of the City into the Pacific Ocean at the location of the Keys channels. In effect, petitioners argue that dumping the silt into the Keys channels falls a little short of the ocean. Silt is dumped in the City (the Keys), not in the ocean. Thus, dredging the Keys is comparable to, and provides the same benefits as, extending the City drainage system past

the Keys all the way out of the City into the ocean. The public improvement which is material to this case is the entire City drainage system, not the dredging at the terminus of that system.

The above discussion attempts to portray petitioners' special benefit argument in a light most favorable to petitioners. But, regardless of how it is characterized, the argument is flawed, and unsupported in the Administrative Record.

4) **"Cause" of Siltation As Shown In The Administrative Record.** Undoubtedly, the silt and debris in the channels come from someplace else. It is undisputed that silt and debris are carried with storm water from other areas of the City and County into the Keys channels possibly through both natural and manmade drainage facilities. The Keys property owners do not "cause" the siltation. But, actual "causation" is for the Adams case, yet to be decided.

5) **Benefit To City As Shown In Administrative Record**. The Administrative Record contains testimony from the Project Manager that dredging is not necessary for the City drainage system to function properly. Silt would drain into the Keys with or without the dredging and with or without the Keys. [AR 2395].

6) **Causation Immaterial To Special Benefit Test.** There is authority that the reason for a public improvement is not relevant to the determination of "special benefit". In Harrison v. Board of Supervisors, supra, 44 Cal.App.3d 852, a district was formed to maintain storm drains. The benefit to the assessed property was prevention of street flooding during the rainy season. The court focused on the benefit from the flooding, not on the property which directed the flood water onto other

property in the district. The court stated that when "water from all the properties drained into the public property ... and the pooled water caused odors, mosquitos or a health problem of some nature, all property owners might well be benefitted equally regardless of the elevation of their land. [44 Cal.App.3d at 857].

In White v. San Diego, supra, 26 Cal.3d 897, the court found that the record supported a special benefit finding because the subject street widening reduced congestion, improved traffic control and the like. The court discounted the fact that the congestion was caused by "strangers" to the property in the district. [26 Cal.3d at 904].

3. The Assessment Is Proportional To Benefit.

Special assessment district assessments must be proportional to the special benefit conferred on the assessed property. Because there is some public benefit from the dredging (enhancement of recreational use of waterways), the City Council agreed to pay 25% of the 1991 District's costs to reflect that public benefit. This allocation is supported in the Administrative Record [AR 2651, 2778, 2879-80], and there is no material dispute over the proportionality of the assessments among the Keys properties.

4. Maintenance Is An Improvement Under 1913 Act.

Petitioners argue that they received no special benefit because dredging is not a proper purpose for a special assessment district. Petitioners argue that a 1913 Act district may be formed to "install" facilities, and to maintain facilities installed by the district, but may not be formed to maintain facilities which were not installed by the district. Since the 1991 District was formed to

maintain facilities constructed by a private developer, it is not a proper 1913 Act district.

This argument has no merit. There is no material distinction between installation and maintenance of improvements. First, while S & H Code Section 10100 used the word "install," S & H Code Section 10006 defines "install" to include "construct, reconstruct, extend, repair and maintain." [S & H Code 10006]. Second, the 1913 Act authorizes the public entity to "acquire or install any or all of the works and improvements authorized by" the 1911 Act "or other works and improvements of a local nature" [S & H Code Section 10102], and the 1911 Act includes "reconstruction and repair" of any "work or improvement." [S & H Code Section 5023]. An annual maintenance levy is authorized. [S & H Code Section 10100.8] Finally, the recent case of Knox v. Orland (1993) 4 Cal.4th 132 determined that maintenance of an existing improvement may be sufficient to justify a special assessment. [4 Cal.4th at 159].

The activities financed by the assessment district include dredging the Keys channels to restore normal navigation to the channels, and necessary work to maintain and repair the Keys channels such as additional dredging, rip rap repair, and other maintenance activities. The Keys channels were dedicated to the City in 1964; hence, they are public property. Dredging and rip rap repair are necessary to allow the Keys channels to be used for their intended purpose, which is navigation. Because dredging and rip rap repair involve repairing, maintaining, and improving public property -- in this case, boating channels -- they are authorized improvements under the 1913 Act.

5. **There Is No Existing City Obligation To**

Maintain Dedicated Waterway.

Closely related to the special benefit issue, is petitioners' contention that the 1991 District is a City attempt to avoid a preexisting obligation to maintain the channels as dedicated public property. Relying on the case of Clay v. Los Angeles (1971) 21 Cal.App.3d 577, petitioners contend that the City has an independent obligation to maintain the channels since the channels are public property. Therefore, shifting the financial burden of maintenance to the Keys residents is not a "benefit" to the Keys residents.

In Clay v. L.A., supra, the issue was whether the City was liable for failing to restore a city street, when the street was washed out by flood rendering the plaintiff's property inaccessible. The City argued that it had no liability since an act of God caused the flood, and since maintenance of streets is a matter of government discretion. The court rejected the City's position. The court stated that owners of property abutting streets have an easement right in the street which is different from their right as a member of the public. A public entity cannot take the right away without just compensation.

The court also stated that property dedication included an expectation that land will be put to the use contemplated by the dedication. Acceptance of dedication of a street creates a burden on the city as well as a benefit of dedication. When a city accepts a dedication and "proceeds to open, establish and maintain a street, persons purchasing and constructing homes on lots abutting that street reasonably expect that the street will continue to exist in a usable condition." [21 Cal.App.3d at 584].

On closer analysis, however, Clay fails to support the petitioners' position. First, even if a city has a duty to

maintain its streets, it may satisfy that duty by creating a special assessment district. The purpose of such districts is to fulfill the government's "duty" to maintain public improvements. By way of example, in Dawson v. Los Altos Hills, supra, 16 Cal.3d 676, a town's contractual duty to handle sewage did not impede the court's affirmation of the creation of an assessment district to fulfill that duty.

Second, the deed under which the channels were dedicated to the City in 1964 contains a provision reserving to the City the right to assess the Keys property for the costs of maintaining the channels.

Third, as the City contends, Clay v. City of L.A. is not controlling since Clay concerned streets. A City has an independent statutory duty to maintain its street system. [S & H Code Section 1806], but no comparable duty exists as to waterways. Also, the Clay court found that there was a reasonable expectation of city maintenance, whereas the instant dedication deed asserts virtually the opposite. The City does not have a pre-existing obligation to maintain the Keys channels as dedicated public property. [Rink v. City of Cupertino (1984) 216 Cal.App.3d 1362, 1367-1368].

6. Tort/Contract Issues Raised In Mandate Points And Authorities.

As stated above, petitioners' special benefit argument addresses liability issues. Petitioners argue that the City has engaged in misconduct by using the Keys channels as a "debris basin" for the City's drainage system. Similar arguments are repeated in different forms throughout petitioners' points and authorities (Aggen and Hibbs). In fact, with the exception of the Traylor argument concerning Revenue and Taxation Code Section 2263,

petitioners' arguments usually touch on liability issues alleged in the Adams cases.

a. Inverse condemnation/nuisance.

Petitioners argue that dredging will remove silt dumped in the channels by a public drainage system which benefits other areas of the City. Like any victim of a nuisance, the Keys residents will benefit from the abatement of the nuisance but removal of harm is not a true benefit. Intentional discharge of silt into the Keys channels through publically-maintained drainage systems constitutes a taking of property which triggers the right to compensation. [Yue v. City of Auburn (1992) 3 Cal.App.4th 751].

As stated above, the instant Aggen mandate cases are separate and distinct from the Adams liability cases. The inverse condemnation/nuisance argument may or may not have merit, and the cited Yue case may or may not be relevant, but the argument does not belong in the instant case.

b. "Secret Condition" In 1964 Dedication.

The Aggen Points and Authorities (pages 21-30) make an argument based upon the 1964 dedication of the channels. Essentially, the argument erects a non-existent "straw man," and, then, knocks the straw man down. In addition, the argument is another liability issue argument.

The deed by which the Keys developer dedicated the channels to public use contains a provision reserving to the City "all of its rights and privileges...under applicable laws to levy or impose taxes, assessments, permits and other charges against the land...for the maintenance and control of the lands" so dedicated. Furthermore, the

resolution approving the Keys development was expressly conditioned on formation of the 1964 District.

The Aggen petitioners concede this undisputable fact, but leap to the erroneous conclusion that the City is relying on the deed condition as the cornerstone of its case. Petitioners contend that the City is contending that the deed condition gives the City the unlimited, and free, right to use the channels as a "debris basin" with no responsibility for the resulting damages. This is a misstatement of the City's position. The City contends that the 1991 District must be evaluated standing alone without consideration of the 1964 District and other historical facts.

c. Salton Bay Case Argument.

The Aggen petitioners also assert that Salton Bay Marina v. Imperial case prohibits the imposition of dredging costs on the Keys property owners. Salton Bay involved the flooding of the Salton Sea. The level of the Salton Sea rises and falls according to the amount of irrigation runoff water which the defendant Imperial Irrigation District allows to flow into the Sea. Imperial County permitted development of the Salton Sea basin, but property owners near the water level were required to grant "easements" to the district which (1) allowed the district to flood the property (by allowing the Salton Sea level to rise), and (2) released the district from any liability from flood damage. The level of the Salton Sea rose, and flooded many properties. The property owners sued the district alleging such causes of action as inverse condemnation, negligence and nuisance. The district contended among other things, that the so-called easements were valid dedications pursuant to Imperial County's police power. Specifically, by agreeing to the easement, the property owners were "dedicating" to the

public an interest in their land sufficient to permit the District to flood the property.

The court rejected this argument determining that the "dedication" exceeded the County's police power because it did not "further the goal of protecting people and property from loss due to flooding." [172 Cal.App.3d at 937-938]. Instead, the "dedication" encouraged economic loss by permitting use of property incompatible with the dedication requirement, i.e., flooding is incompatible with use of property for residential and commercial purposes. Furthermore, the "dedication" only shifted liability away from the negligent party; it did not provide for the welfare of the public.

Petitioners contend that the Aggen cases are similar to Salton Bay. They argue that use of the Keys Channels as a debris basin is incompatible with their use as navigable waterways. Therefore, the 1964 condition permitting the City to assess the Keys properties for all dredging costs exceeds the City's police power.

Petitioners' connection of the instant case to Salton Bay is unconvincing. First, the argument by the irrigation district in Salton Bay was convoluted and would have required the court to magically construe an easement as a dedication. The court's unwillingness to accept this tortured argument cannot be elevated to a statement of general applicable principle.

Second, the easement in Salton Bay contemplated flood damage, and specifically released the district from liability for its own wrongful conduct. The Salton Bay court was concerned with the propriety of liability releases. Nothing in the 1964 dedication of the Keys channels releases the City from anything. The 1964 dedication constitutes an allocation of costs to the property

receiving the benefit of the costs.

Third, the petitioners' argument is just another variation on petitioners' arguments raising liability issues. It requires the court to conclude that the City engaged in wrongful conduct by using the channels as a "debris basin."

Fourth, the argument assumes the 1964 deed dedicating the channels is essential to the lawful creation of the 1991 District. As stated above, the 1991 District can stand on its own. [Also see, Russ v. San Francisco (1988) 44 Cal.3d 839].

7. Rev & Tax Code Section 2263(2) Does Not Apply To 1991 District.

The Traylor petitioners focus their entire Points and Authorities on the contention that formation of the 1991 District violates Rev & Tax Code Section 2263. The contention has no merit.

a. Early History of 1964 District.

Undisputedly, the City and the Keys developers knew the channels would need periodic dredging, and the 1964 District was formed to impose dredging costs on the Keys properties, not the City as a whole. The deed dedicating the channels to public use contained a provision for assessing the Key properties for channel maintenance. In addition, approval of the Keys was expressly conditioned on formation of the 1964 District.

The 1964 District was formed under the 1911 Act [Streets & Highways Code Sections 5000 et seq.], not the 1913 Act. As created, the 1964 District levied an "assessment" against the Keys properties on an ad

valorem basis. The 1964 District operated smoothly until 1973 when two important events occurred; (1) the City substantially increased the "assessment" from $45 to $600, and (2) a property tax relief act was enacted [codified in Rev & Tax Code Sections 2201 et seq.].

b. 1973 Property Tax Reform.

In relevant part, this reform act placed a limit on property taxes rates by prohibiting any increase in property tax rate above the 1972-1973 level, except by approval of the voters in the affected locality. [Rev & Tax Code Section 2263]. This tax limitation invalidated the City's proposed increase in the 1964 District's assessment. [See 57 Op.Atty.Gen. 1 for an analysis of the impact of the tax reform act on the 1964 District].

Thereafter, the City essentially abandoned the 1964 District. The Keys property owners have not contributed to the 1964 District since 1978, and the only dredging since then has been performed with federal money.

c. Petitioner Argument.

The Traylor petitioners contend that the 1991 District circumvents the Rev & Tax Code Section 2263 limitation on property tax rates. Although the 1964 District and the 1991 District were formed under different statutes, both districts serve the identical purpose, and, in fact, no new improvements were constructed or created by the 1991 District. There is only a change in description. What was called "maintenance" under the 1964 District is called "improvements" under the 1991 District. Also, any special benefit to the Keys properties is identical under both the 1964 and 1991 Districts. If creation of a new district under the 1913 Act were sufficient to avoid Rev & Tax Code Section 2263, the section would have no teeth.

d. The 1991 District Is Not Subject To Rev & Tax Code 2263.

Petitioner's argument is meritless. Rev & Tax Code Section 2201, et seq. (including 2263) apply only to ad valorem property taxes, not to special assessment districts.

1) A "special district" includes "a maintenance district or area, an improvement district or improvement zone, or any other zone or area formed for the purpose of designating an area within which a property tax rate will be levied for a service or improvement benefiting that area." [Rev & Tax Code Section 2215]. "Property tax rate" is defined as meaning "any rate or assessment which is levied per unit of assessed value of property." [Rev & Tax Code Section 2213]. Therefore, while the 1991 District might generically be called a maintenance or improvement district under Rev & Tax Code Section 2215, the 1991 District does not levy its assessment "per unit of assessed value of property."

2) Rev & Tax Code Sections 2201, et seq. are located in the Division of the Revenue and Taxation Code devoted to property tax, whereas special assessments by special assessment districts are not covered in that Division at all. While "special assessments" are authorized under the government's taxing power, they are not generally considered property tax.

3) There is no case law applying the 1973 legislation to special assessment districts, and every post-Proposition 13 case which considered the issue, clearly concludes that special assessment districts remain unaffected by Proposition 13.

e. No Prohibition On Changing A Revenue-

Raising Method.

The 1991 District is an alternative to the 1964 District. If the 1964 District could levy unlimited assessments, there would have been no need for the 1991 District. In essence, the City created one revenue-raising device which was emasculated by legislation, and thereafter, the City created another revenue-raising device to raise revenue for the same purpose.

There is nothing in the points and authorities filed by any of the petitioners which challenges the legality of this shift on a conceptual basis. The Traylor petitioners contend that Rev & Tax Code Section 2263 thwarts the City's shift in revenue raising devices, but there is no other challenge to the City action. Furthermore, Knox v. Orland, supra, 4 Cal.4th 132, the Court noted with approval that Cities shift from funding through general tax revenues to funding through an assessment districts.

7. Creation of 1991 District -- Technical, Procedural Requirements.

There is no significant dispute as to the events or their timing. While the creation of the 1991 District was on the drawing board for a considerable period of time, the resolution of intent was enacted, and the Engineer's Report was both ordered and adopted at the same time. Petitioners, however, cite no statutes or cases which require or even permit the court to determine that the 1991 District was improperly created. Petitioners have not set forth any procedural errors in the assessment district proceedings that deprived them of notice and an opportunity to be heard.

Petitioners have pointed out in their points and authorities filed pursuant to the Minute Order of April 24,

1995, raising the issue for the first time in the nearly 3 1/2 year history of the case, that the resolution adopted by the City to overrule the majority protest, Resolution 91-89, is a resolution for overruling a less-than-majority protest. While this appears to be true, it is also apparent from the Administrative Record that everyone involved in the proceedings, including the City Council, City staff, and petitioners, was aware that a majority protest had been filed.

The assessment district counsel and City staff informed the City Council of the fact that a majority protest had been filed [AR 2531, 2857], and the City Council overruled the majority protest by a 4/5 vote [AR 2881, 2883-85]. When the vote overruling the majority protest was cast, the City Council had two versions of the pertinent resolution before it, one to overrule a less-than-majority protest and one to overrule a majority protest. [AR 2375-93 (staff report with two versions of resolution attached at AR 2382-85)]. There is also substantial evidence in the record that the City Council actually did vote on and overrule a majority protest. [AR at 2883, "Mayor: Dealing now with the resolution of the City of Ventura overruling and denying a majority protest, and making certain findings in a special assessment district. I move adoption (emphasis added)."]

The City Council fulfilled the proper procedural requirements for overruling the majority protest; a simple clerical error was made when the resolution was executed, and the wrong version was formalized. [See Declaration of Barbara J. Kam]. This mistake in no way casts into doubt the validity of the assessment district, as it did not in any manner deprive petitioners of notice of the protest hearing and an opportunity to be heard. [Capital Freight Lines v. City of Sacrament (1962) 206 Cal.App.2d 279, 282]. The Majority Protest Act provides an alternate

method for forming assessment districts, which was followed by the City in this case, calling for a combined engineer's and debt limitation report and relying on the procedural requirements of the 1913 Act. [AR 2773 (Resolution 91-79)]. S & H Code Section 2961 reads as follows: "If a legislative body determines to proceed under this part in forming an assessment district pursuant to the [1913 Act], it shall, in addition to complying with all requirements of that act, do all of the following ...." All the relevant procedures for forming an assessment district are found in the 1913 Act which does provide for majority protests. [See S & H Code Sections 10301 (hearing of protest), 10210, (filing of protests) and 10311 (overruling protests)]. No special findings were required in 1991. Since the City followed the procedural requirements of the 1913 Act, it also thereby complied with the requirements of the Majority Protest Act.

The City did make a finding "that the public convenience and necessity require such improvements" pursuant to California Constitution Article 16, Section 19. Plaintiffs once more ignore substantial evidence in the record that contradicts their claim. [AR 2782A].

The Hibbs petitioners contend that the assessment district procedures violated due process.

First, petitioners allege that the assessment district hearings were not sufficiently trial-like; i.e., that evidence was not "introduced", that no opportunity for cross examination was provided, and that speakers should not have been limited to five minutes. Petitioners do not, however, cite any statutory or case authority for the proposition that these formalities are required to form an assessment district, which is a legislative determination. [Dawson v. Town of Los Altos Hills, supra, 16 Cal.3d at 683; Noyes v. Chambers and Golver (1927) 202 Cal.

542,544-45 (confirming that due process requires only notice and an opportunity to be heard on the question of whether there is a benefit and the extent of benefit); Firetone Tire and Rubber Co. v. Board of Supervisors (1958) 166 Cal.App.2d 519, 529]. The cases cited by petitioners either are not assessment district cases (but deal with judicial or quasi-judicial proceedings) or, if assessment district cases, do not support the propositions advanced by petitioner. Nor have petitioners ever claimed that they were not given an opportunity to be heard on the question of whether there is benefit and the extent of benefit. On the contrary, the Administrative Record is filled with substantial evidence of petitioners' participation in hearings, and filing of protests and other materials. Counsel for the Save the Keys Committee, for example, was granted an entire hour to testify. [AR 2512, 2535-55].

Second, plaintiffs allege, citing Safeway Stores, Inc. v. City of Burlingame (1959) 170 Cal.App.2d 637, that the City Council rendered its decision based on facts that do no appear in the administrative record. In Safeway Stores, a parking assessment district was invalidated by the court on the grounds that it did not provide a special benefit to Safeway because the store in question already had more than enough parking for its current needs and for the foreseeable future [170 Cal.App.2d at 644]. The court found that the facts used by the City Council in making its determination of benefit "were not recited at all in the record, and consequently were unknown to the protestants and hence could not be met or overcome by them. [170 Cal.App.2d at 647]. By contrast, the administrative record in this case is replete with staff reports, studies, and testimony concerning the bases for forming the assessment district.

Finally, plaintiffs claim that members of the City

Council were "contaminated" both because they had held closed sessions and because they engaged in public workshops and in negotiations with petitioners. It is well settled, however, that council members have "not only a right but an obligations to discuss issues of vital concern with [their] constituents and to state [their] views on matters of public importance," and that such activities do not disqualify them from voting on matters that come before them. [City of Fairfield v. Superior Court (1975) 14 Cal.3d 768, 780-81]. Plaintiffs point to no authority holding that the alleged activities of members of the City Council were either illegal or in any way affect the validity of the assessment district.

It is well established that due process, for purposes of forming an assessment district, requires only notice of a hearing to protest the assessment and an opportunity to be heard upon protest. [Capital Freight Lines, supra, 206 Cal.App.2d at 281-82]. In forming the assessment district, the City provided opportunities for public participation that exceeded due process requirements.

CONCLUSION

Based on the reasoning set forth above, this Court denies petitioners respective petitions for writ of mandate and related requests for declaratory and injunctive relief, and attorneys' fees and costs.

Dated: April 30, 1996

S/ S. P. CHAPIN
HONORABLE SIDNEY P. CHAPIN,
Judge of the Superior Court

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

ALVIN AGGEN et. al.,	2d Civil No. B102638 (Super. Ct. No. 118395)
Plaintiffs and Appellants,	(Ventura County)
v.	Court of Appeal - Second Dist. FILED JUN 19, 1997
CITY OF SAN BUENAVENTURA,	JOSEPH A. LANE, CLERK Deputy Clerk
Defendant and Respondent.	
FLING TRAYLOR et. al.,	(Super. Ct. No. 118544) (Ventura County)
Plaintiffs and Appellants,	
v.	
CITY OF SAN BUENAVENTURA et. al.,	
Defendants and Respondents.	

HARRY R. HIBBS et. al.,	)	(Super. Ct. No. 119484
	)	(Ventura County)
Plaintiffs and Appellants,	)	
	)	
v.	)	
	)	
CITY OF SAN BUENAVENTURA	)	
	)	
Defendants and Respondent.	)	
	)	

Who should pay the cost of dredging and maintaining the water channels in the Ventura Keys (Keys)? Appellants, who own waterfront homes next to the Ventura Marina, challenge a resolution by the City of San Buenaventura (City) creating the Porto Bello Assessment District No. 91-1, pursuant to the Municipal Improvements Act of 1913. (Sts. & Hy. Code, § 10000 et seq.)[1] The trial court confirmed the validity of the assessment district and upheld the assessment. We affirm.

Facts

The Ventura Keys, a subdivision consisting of 299 waterfront homes, is built on three navigable channels (the Keys Channels) above a stub channel that leads to the Ventura Marina and ocean. The stub channel is at the base of the Arundell Barranca, as depicted on the attached

[1]All statutory references are to the Streets and Highways Code unless otherwise stated.

map.[2]

Before the Keys was developed, the barranca was a gorge that carried rainwater, silt, and debris to the ocean. Today, the barranca services a watershed area of more than 7,500 acres. Mud and debris from the barranca will render the Keys Channels unnavigable unless City dredges the channels on a periodic basis.

In 1964, the Keys developer anticipated that the channels would require occasional dredging. City conditioned approval of the subdivision on formation of a

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[2]Pursuant to a written agreement between the developer and the Ventura Port District, Keys homeowners were granted an access easement across the stub channel. (See, *Ellison v. City of San Buenaventura* (1975) 48 Cal.App.3d 952, 956.) In 1970 the stub channel became so clogged with silt and debris that the Keys residents could not navigate their boats. The residents filed suit for injunctive relief, specific performance, and a class action for damages. The lawsuit was the subject of two appeals: *Ellison I* (*Ellison v. City of San Buenaventura*, *supra*, 48 Cal.App.3d 952), and *Ellison II* (*Ellison v. Ventura Port District* (1978) 80 Cal.App.3d 574.) In *Ellison I*, the Court of Appeal affirmed the trial court's finding that the Port District was contractually required to maintain the stub channel. (*Ellison v. City of San Buenaventura*, *supra*, 48 Cal.App.3d at p. 960.) In *Ellison II*, the Court of Appeal held: "It is clear from *Ellison I* that the [stub] channel was built and was to be maintained as a navigation and drainage channel. [Citation.]" (*Ellison v. Ventura Port District*, *supra*, 80 Cal.App.3d at p. 578.) *Ellison I* and *Ellison II* did not address the question of who bears the cost of dredging the Keys Channels.

maintenance district. The developer dedicated the channels but reserved private boat slip and dock easements appurtenant to each lot in the Keys. In accepting the dedication, City reserved the right to levy taxes and assessments to maintain the channels.[3] On April 6, 1964, the city council formed the Porto Bello Maintenance District pursuant to the Municipal Improvement Act of 1911. (§5000 et seq.) Property owners were taxed $30 to $45 a year for channel maintenance and dredging.

The dredging costs dramatically increased. In 1973, it was estimated that a $650 annual assessment was needed to complete the work. With the passage of Proposition 13 (Cal. Const., art. XIIIA) in 1978, the district's ad valorem tax did not generate enough revenue to maintain the channels. In 1979, the maintenance district ceased levying taxes. From 1979 to 1982, City used its general funds and a federal emergency grant to pay dredging costs.

In 1990, the city council proposed creating an assessment district pursuant to the Municipal Improvement Act of 1913. City retained an engineering consultant, William C. Stookey, to prepare a comprehensive engineer's report. Stookey had 40 years of engineering

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[3]The grant deed was recorded May 29, 1964 and provided: "Said City of San Buenaventura by its acceptance of this deed reserves all of its rights and privileges which it now has or may hereafter have under applicable laws to levy or impose taxes, assessments, permits and other charges against the land to which said parcel 'A' is adjacent or any parts or portions thereof, for the maintenance and control of the lands transferred to said City hereby."

experience and had helped create more than 200 assessment districts.

After the report was prepared, city council adopted a resolution of intention and moved forward with the assessment district. City held public workshops and responded to questions concerning the engineer's report. Keys residents opposed the formation of the assessment district; 84 percent of the residents filed written protests. On September 24, 1991, the city council overrode the majority protest, approved the engineer's report, and formed the assessment district. (§§ 10310.4, 10311, 10312).

The assessment district levied a $1,622 assessment on each of the 299 privately-owned properties having an appurtenant boat slip and dock easement. The assessment was prorated to pay dredging costs, repair the rock revetment, finance future dredging, and pay for administrative costs. Property owners were assessed 75 percent of the dredging costs. The city council determined that 25 percent of the dredging costs would be borne by the City because the Keys Channels provided a limited recreational benefit to the public. City agreed to pay the assessments on three commonly-held beaches in the Keys subdivision.

Appellants filed three actions challenging the validity of the assessment district. The first mandamus action was filed October 15, 1991. (*Aggen et al. v. City of San Buenaventura*, Super. Ct. Ventura County, No. 118395). The second action was filed October 23, 1991. (*Traylor et al. v. City of San Buenaventura et al*, Super. Ct. Ventura County, No. 118544.) A third suit was filed December 24, 1991 (*Hibbs et al. v. City of San Buenaventura* Super., Ct. Ventura County No. 119484). Unlike the other actions, the Hibbs complaint alleged a

fifth cause of action for inverse condemnation and damages. The trial court severed the inverse condemnation cause of action and consolidated the complaints. After extensive briefing and argument, the court found that the assessment district was lawful and upheld the assessment.

Appealable Judgment

The parties request that we treat Hibbs' appeal as a petition for writ of mandate. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 744-747.) After the trial court severed the cause of action for inverse condemnation, counsel believed that the judgment validating the assessment district was final and appealable. The parties agree that the cause of action for inverse condemnation is a separate and distinct claim, unrelated to the validation actions. In the interests of judicial economy, we treat Hibbs' appeal as a petition for writ of mandate. (Id., at p. 746; *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 554.)

Standard of Review

An assessment district is a district of land to be benefitted by improvements and to be specially assessed to pay the cost and expense of the improvements. (§ 10008.) "[T]he justification for the imposition of a special assessment is that the property to be assessed will receive a special benefit over and above that received by the general public. [Citations.]" (*City of Baldwin Park v. Stoskus* (1972) 8 Cal.3d 563, 568.) Because the formation of a special assessment district is a legislative process grounded on the City's taxing power, the scope of review is narrow. (*Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 684.) "A special assessment

finally confirmed by a local legislative body in accordance with applicable law will not be set aside by the courts unless it clearly appears on the face of the record before that body, or from facts which may be judicially noticed, that the assessment as finally confirmed is not proportional to the benefits to be bestowed on the properties to be assessed or that no benefits will accrue to such properties." (Id., at p. 685.)

Municipal Improvement Act of 1913

Appellants argue that the dredging work is not an "improvement" under the Municipal Improvement Act of 1913 (§ 10000, et seq.), and may not be financed by special assessments. We disagree. The Municipal Improvement Act of 1913 authorizes the formation of an assessment district for any work or improvement described by the Improvement Act of 1911 (1911 Act). (§ 10102.)[4] Section 5101, subdivision (m), of the 1911 Act permits assessments for "[t]he construction, repairing, maintaining, or improving of . . . channel improvements . . . ." Section 5101, subdivision (o), provides that special assessments may be imposed for "[a]ll other work which may be deemed necessary to improve the whole or any portion of those . . . places, public ways, property, easements, or rights-of-way owned by the city."

The trial court found that the dredging and repair

[4]Section 10102 provides in pertinent part: "Notwithstanding any other provision of this division, whenever the public interest or convenience requires, the legislative body of any municipality may . . . acquire or install any or all works and improvements set out in, the Improvement Act of 1911 (Division 7 (commencing with Section 5600)) . . . ."

work was an improvement under the 1911 Act. We agree. The developer (Pacesetter Homes) dedicated the Keys Channels but reserved an easement granting each property owner the right to dock a boat in front of his or her property. City accepted the dedication subject to the condition that it would levy taxes and assessments to maintain the channels. We conclude that the Municipal Improvements Act of 1913 vested the City with the power to create an assessment district to maintain the channels for the benefit of Keys property owners.

Appellants contend that the term "channel improvements" as set forth in section 5101, subdivision (m), only permits assessments to build or improve a channel. Not so. Section 5003 states that the Improvement Act of 1911 must be liberally construed to effectuate its purpose. The trial court correctly found that section 5101, subdivision (m), permits special assessments to dredge and maintain the Keys Channels. (E.g., *Knox v. City of Orland*, supra, 4 Cal.4th 132, 139 [special assessment imposed to maintain an existing park]; *City Council v. South* (1983) 146 Cal.App.3d 320, 330 [assessment to maintain landscaped median islands on public streets]; *American River Flood Control Dist. v. Sayre* (1982) 136 Cal.App.3d 347, 352 [special assessment to operate and maintain flood control system]; *Russ Bldg. Partnership v. City & County of San Francisco* (1988) 44 Cal.3d 839, 843 [assessment-like funding mechanism to pay for maintenance of mass transit system].)

Special Benefit

Appellants challenge the assessment on the ground that the properties receive no special benefit. They assert that the City has imposed a "tax" on 299 property owners to clean up the City's drainage system. We conclude that

the assessment is proper because appellants will receive a special benefit over and above that received by the general public. (*City of Baldwin Park v. Stoskus*, *supra*, 8 Cal.3d 563, 568-569.) Appellants have failed to demonstrate that the city council's finding of special benefit is arbitrary, capricious, or lacking in evidentiary support. (*Knox v. City of Orland*, *supra*, 4 Cal.4th 132, 149 & fn. 26.)

"[T]he judicial inquiry is limited to the determination of whether the property assessed would receive some substantial benefit. [Citations.]" (*Kalashian v. County of Fresno* (1973) 35 Cal.App.3d 43, 49.) A special benefit exists even when the property owner does not intend to make use of the benefit received. (*Howard Park Co. v. City of Los Angeles* (1953) 119 Cal.App.2d 515, 519.)

Here the special benefit is an unobstructed private easement to dock boats. "Of course, the amount of each individual assessment is not necessarily measured by the precise amount of 'benefit' flowing to the property owner affected. The assessment is usually based upon the cost of the improvement, spread among the benefitted property owners upon some equitable, nondiscriminatory basis. [Citation.] The absence of an exact relationship between the assessment levied and the benefit received will not, however, invalidate the assessment, at least in the absence of fraud, mistake or gross injustice. [Citations.]" (*City of Baldwin Park v. Stoskus*, *supra*, 8 Cal.3d 563, 568-569.)

In *Dawson v. Los Altos Hills*, *supra*, 16 Cal.3d 676, the City of Los Altos Hills created a special assessment sewer district. Included within the district were properties already receiving sewer service. The property owners challenged the special assessment on the ground

that it was disproportionate to the benefits received. Our Supreme Court held that: "... the fact that the benefit to the assessed property accrued prior in time to the establishment of the assessment district does not compel the conclusion that the assessment must fail. So long as special benefit to the property assessed resulted from the expenditure of public funds, we see no reason why the public entity should be foreclosed from looking to those so benefitted from shouldering all or a part of the cost . . . ." (Id., at p. 688.)

Substantial evidence supports the finding that the improvements confer special benefits on appellants' properties. The engineer's report states that the dredging and repair work will enhance appellants' ability to use the channel easement, protect their property and dock facilities, allow appellants to dock boats next to their homes, provide clear access to the harbor, and enhance appellants' living environment and land values. The engineer's report further states that "[m]aintenance and repair of the rock revetment is a specific benefit to those properties fronting the Ventura Keys waterways. The general public does not benefit from this slope repair activity since all repairs occur within the easements granted for usage to the property owner."

The city manager, in a separate report, agreed with the findings and assessment formula set forth in the engineer's report. The decision to allocate 75 percent of the costs to the property owners was based on the square footage of waterway surface fronting the homes. Terry Rodrique of Willdan Associates (the engineering firm retained by City) and the City Project Manager, Barbara Fosbrink, testified that the assessment formula was fair

and reliable.[5] In response to appellants' arguments about special benefits, Fosbrink stated: "It is true that the City benefits from its drainage system [i.e., the barranca], no one questions that. The critical point, however, is that the drainage system does not benefit from the dredging. It's important to recognize there is no need to dredge anything for the purpose of drainage. Silt is historically deposited in the area that is now the Keys, and if in fact, the Keys [had] not been constructed, the City would not be involved in helping to resolve the question in what to do with the silt. It is because of the exclusive easement for boat docks on waterfront property owners that the City has a role in resolving the removal of accumulated

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[5]Rodrique testified that the "special benefits in this case is the use of the easement area, the entire easement area. . . . In order for property owners to use any or all of the exclusive easements, the channels need to be dredged. Another argument at this point arises as to the fact that the docks are built five feet from the edge of the easement on either side. In [other] words a five foot side line setback. . . . Many of the docks are built within five feet of the outside easement as well such that when boats are parked, a portion of the boat is parked virtually full-time in the public waterways. One other item I must point out is that based on assessment law, the analysis must consider the potential and ultimate use of the properties, in this case the easements, and is not necessarily limited to the use currently being made of the property or the easements. In other words, whether a person has a dock or not within their easement is of no consequence provided he or she has the rights to such. Certainly, the special benefit to the property owners is not only the exclusive easements and parking of their boats in the public waterway, but also the unlimited clear access along these channels to the ocean."

material. The proposed work . . . is for the sole purpose of ensuring that the waterfront property owners have original design access to their exclusive easement for boat docks."

The engineer's report clearly supports the finding that the improvement will specially benefit appellants' property. (*Jenner v. City Council* (1958) 164 Cal.App.2d 490, 497-498.) "The court does not have a right to judge the intrinsic value of evidence submitted to the council, nor to weigh it. [Citation.] Nor will the court consider evidence contrary to that in support of findings made by the council. [Citation.]" (*Jeffrey v. City of Salinas* (1965) 232 Cal.App.2d 29, 35.)

Causation

Appellants contend that the special assessment is invalid because the silt and debris was caused by urban development and City's overuse of the barranca. They argue that City has a legal duty to maintain the channels and may not shift that cost to the Keys residents. We agree that City's use of the barranca as a drainage facility may give rise to liability for inverse condemnation. (E.g., *Yue v. City of Auburn* (1992) 3 Cal.App.4th 751, 758-759 [intentional discharge of surface waters through a public drainage system may constitute a taking].) However, the issue of causation may not be used to invalidate an assessment district that specially benefits waterfront properties. (E.g., *White v. County of San Diego* (1980) 26 Cal.3d 897, 904-905; *Duncan v. Ramish* (1904) 142 Cal. 686, 693-694; *Hornung v. McCarthy* (1899) 126 Cal. 17, 22.)

The trial court found that causation "does not belong in the instant case." We agree. The damage claims were severed and not part of the validation action. The record

further indicates that the city council received conflicting evidence concerning the cause of the siltation.[6] We may not reweigh the evidence and draw conclusions different from that of the City council. "The [city's] determination of benefit is conclusive unless absence of benefit clearly appears from the record or judicially noticed facts. [Citations.]" (*White v. County of San Diego*, *supra*, 26 Cal.3d 897, 904.)

The Public Street Analogy

Appellants contend that the improvements do not provide a special benefit because the Keys Channels are public streets and City has a duty to maintain them. (See, § 1806 [cities have a duty to maintain streets accepted into the city street system].) The argument lacks merit. A municipality may form an assessment district for streets repairs if the improvement confers a special benefit on property within the district. (§§ 10102, 5101, subd. (o); *Knox v. City of Orland*, *supra*, 4 Cal.4th 132, 145.) The Municipal Improvement Act of 1913 provides that a municipality may "install" improvements (§ 10102); the word "install" includes ". . . reconstruct, extend, repair, and maintain." (§ 10006.)

Appellants' reliance on *Clay v. City of Los Angeles* (1971) 21 Cal.App.3d 577 is misplaced. There, the city

[6]Appellants claim that the silt and debris is caused by urban growth and use of the barranca as a drainage facility. The engineer's report states that urban development has resulted in a decrease of sediment deposits. The report notes that 36,730 feet of drainage channels leading to the barranca was lined to decrease erosion and that a large debris basin intercepts much of the silt and debris.

refused to restore a city street that was washed out by a flood. The homeowners could not access their property. The Court of Appeal held that the homeowners had a reasonable expectation that the city would maintain the street. (Id., at pp. 584-585.)

Clay v. City of Los Angeles, *supra* is distinguishable on several grounds. When the Keys developer dedicated the channels, City reserved the right to levy assessments to maintain and repair the channels. In 1964, City created a maintenance district and levied assessments to dredge the channels. The homeowners had no reasonable expectation that City would pay future dredging costs. By 1970, the stub channel was so clogged with silt and debris that the Keys residents filed a class action for damages. (See, *Ellison v. Ventura Port District*, *supra* 80 Cal.App.3d 574, 583.)

Unlike the property owners in *Clay v. City of Los Angeles*, *supra*, appellants derive a special benefit when the City dredges the channels. Appellants have an exclusive easement to dock boats and will directly benefit from the dredging and repairs. (E.g., *White v. County of San Diego*, *supra*, 26 Cal.3d 897, 904 [assessment for street improvements based on special benefits which included reduction of traffic congestion and better access to abutting property].) "'That property abutting upon a street improvement will be specially benefitted to some extent does not admit of debate. How much and to what extent it may be benefitted are questions purely within the exclusive province of the city council and there is nothing appearing upon the face of the proceedings to show that they did otherwise than to fix said district after due consideration of the special benefits to result from the construction of the improvement.' [Citations.]" (Ibid.)

Are the Assessments Proportionate to the Benefits?

Hibbs argues that the assessment is disproportionate to the special benefits enjoyed by the property owners. We disagree. The assessment formula is based on the recommendations in the engineer's report. Substantial evidence supports the city council's finding that a flat assessment on each parcel is proportionate to the special benefits enjoyed by each property owner. (*City of Baldwin Park v. Stoskus*, *supra*, 8 Cal.3d 563, 568.) "'The absence of an exact relationship between an assessment levied and the benefit received will not . . . invalidate the assessment, at least in the absence of fraud, mistake or gross injustice. [Citations.]' [Citations.]" *White v. County of San Diego*, *supra*, 26 Cal.3d 897, 905.)

Hibbs contends that the assessments must be apportioned to reflect lot size and lineal feet of water frontage. He asserts that a uniform assessment on each lot is invalid as a matter of law. Not so. In *Knox v. City of Orland*, *supra*, 4 Cal.4th 132, the special assessment was $24 per dwelling unit. The Supreme Court found that the assessment was fair and proper. (Id., at pp. 147-148.)

Here, each of the waterfront properties come with a private easement to dock a boat. The evidence supports the finding that the dredging and channel repairs will confer a special benefit on each property. The benefit does not significantly change based on the lot size. The formula used to calculate the assessment is fair and nondiscriminatory. (*White v. County of San Diego*, *supra*, 26 Cal.3d 897, 905.)

Procedural Irregularities

In forming the assessment district, City was required to follow five steps: (1) pass a resolution of intention (§ 10200), (2) prepare the engineer's report (§§ 10203, 10204), (3) approve the engineer's report (§ 10300), (4) conduct a public hearing for protests (§ 10301), and overrule the majority protest (§ 10311) if any, and (5) confirm the proposed assessment (§ 10312); see *Dawson v. Town of Los Altos Hills*, *supra*, 16 Cal.3d 676, 683.) Those steps were followed here. The city council held a public hearing and 84 percent of the property owners lodged protests. The city council, by a six-to-one vote, overruled the majority protest.

Hibbs cites *Todd v. City of Visalia* (1967) 254 Cal.App.2d 679, for the proposition that the statutory requirements for formation of an assessment district must be strictly observed. "Strict compliance with statutory directions is not invariably demanded, however, even where the validity of an improvement district is being challenged." (*Downtown Palo Alto Com. For Fair Assessment v. City Council* (1986) 180 Cal.App.3d 384, 394.) Hibbs claims many procedural irregularities. As we shall explain, the alleged errors do not invalidate the assessment district. Section 10012 states in pertinent part: "No error, irregularity, informality, and no neglect or omission of any office, in any procedure taken under this division, which does not directly affect the jurisdiction of the legislative body to order the work or improvement, shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder."

Engineer's Report

Hibbs argues that City violated sections 10200 and 10203 by retaining the engineering consultant to prepare a

report before the resolution of intention was adopted. The argument lacks merit. City acted properly when it retained the engineer to expedite formation of the assessment district. (E.g., *Jeffrey v. City of Salinas* (1965) 232 Cal.App.2d 29, 43 [engineer's report filed and approved the same day the city council passed a resolution of intention to form parking district].) Hibbs' objection is a technical one and does not invalidate the assessment district. (Ibid.)

Hibbs argues that the engineer's report is defective because the diagram attached to the report does not set forth the lines and dimensions of each parcel in the assessment district. Section 10204, subdivision (d), requires that the report include a diagram showing the boundaries of the assessment district, and the lines and dimensions of each parcel within the district. Here, the diagram is a county assessor's map that depicts the boundaries of each parcel, the assessor's parcel numbers, the district boundaries, and provides a legal description. Section 10204, subdivision (d) provides in pertinent part that "[t]he diagram may refer to the county assessor's maps for a detailed description of the lines and dimensions of any parcels, in which case those maps shall govern for all details concerning the lines and dimensions of the parcels." Hibbs has failed to demonstrate that the diagram is defective.

Hibbs contends that the city council violated sections 10300 and 10301 by giving preliminary approval of the engineer's report and noticing the protest hearing before the report was filed. The argument is not supported by the record. The city council adopted resolution number 91-80 on August 19, 1991. The resolution recited that the engineer's report was "filed with the legislative body" and "is preliminarily approved." It is presumed that official duty was performed. (*City of National City v. Dunlop*

(1948) 86 Cal.App.2d 380, 384; Evid. Code, § 664.) We conclude that the engineer's report was timely filed. No one attending the August 19, 1991 hearing complained that the engineer's report had not been filed.

Published Notice

Hibbs next asserts that the city council violated section 10301 by not designating a newspaper to publish the required notices. Resolution number 91-80 directed the city clerk to publish notice of the protest hearing in accordance with Government Code section 6066. The city council conducted the protest hearing on September 23 and 24, 1991, 35 days after it adopted resolution 91-90.

The notices were properly published. Section 10301 does not prohibit the use of the Government Code procedure to designate a newspaper for publication. Appellants were not prejudiced or denied notice of the protest hearing. Hibbs argues that the notices do not state that the engineer's report has been filed, the amount to be assessed on the properties, or that any interested person could file a written protest. The record is to the contrary. All of the notice requirements set forth in sections 10301, 10303, 10304, 10306, and 10307 were satisfied.

Assessment District Map

Hibbs claims that City violated sections 3111 and 10310 because the city clerk did not endorse the assessment district map and written protests. Hibbs also claims that the city clerk failed to file the map in the clerk's office and county recorder's office (§ 3111), or present all of the written protests to the City council (§ 10310).

The argument lacks merit. On September 25, 1991, the city council directed the city clerk to file a copy of the map with the county recorder. The city clerk filed the Engineer's report and assessment district map on September 25, 1991. The administrative record indicates that the written protests were before the city council. Absent evidence to the contrary, we presume that the city clerk performed her official duty and presented all of the written protests to the city council. (Evid. Code, § 664.)

Legislative Vote Overruling Majority Protest

Hibbs argues that City acted illegally in overriding the majority protest by not complying with sections 2930 and 2932 of the Majority Protest Act. City however, elected to proceed under the alternative procedure set forth in sections 2960 and 2961 of the Majority Protest Act.

Hibbs claims that the city council violated article XVI, section 19 of the California Constitution by failing to make a finding of public convenience and necessity. The finding appears in resolution number 91-90. Hibbs points out that the city clerk certified the wrong resolution. When the city council voted to overrule the protests, it had two draft resolutions before it: one overruling a majority protest, and a second resolution draft overruling a less than majority protest. The city clerk certified the latter. Upon discovering the error, the city clerk executed the right version and certified resolution number 91-90. The trial court found the clerical error harmless. We agree. The error did not prejudice appellants or invalidate the formation of the assessment district.
(§ 10012.)

Hibbs' remaining due process arguments are without merit. City made the engineer's report available for review 35 days before the protest hearing. Two public workshops were held to respond to questions and consider public comments. At the protest hearing, counsel for the Save the Keys committee was granted an hour to testify and 54 persons addressed the city council. The City council continued the hearing to give everyone an opportunity to speak.

Hibbs finally argues that the protest hearing should have been conducted like a trial with the administration of oaths, the cross-examination of witnesses, and the exclusion of hearsay evidence. Hibbs cites no authority, and we have found none, holding that such a procedure is required.

1964 Maintenance District

The Traylor appellants contend that City must use the 1964 maintenance district to levy assessments for the dredging work. The maintenance district, which was funded by ad valorem property taxes, still exists today. It stopped levying taxes in 1978 after the passage of Proposition 13.

Appellants argue that City is barred from changing the funding mechanism and forming a new assessment district. A similar argument was rejected by the Supreme Court in *Knox v. City of Orland*, *supra*, 4 Cal.4th 132. There, the city levied a special assessment to maintain a park. The Supreme Court held that "the city's decision to change funding sources for an improvement is not fatally inconsistent with the theory underlying benefit assessments. In the first place, we recognized long ago that a public entity's choice initially to fund an improvement out of tax revenues should not prevent it

from deciding later that funding by special benefit assessment would be more appropriate. [Citation.] Plainly, if an improvement provides a special benefit, that benefit exists whether or not the public entity was correct in first financing it out of its general fund." (Id., at p. 150.)

The same principle controls here. Substantial evidence supports the finding that property within the district will specially benefit from the improvements and that the assessments are fairly apportioned. Appellants nonetheless argue that the assessment district violates Revenue and Taxation Code section 2201 et seq., which restricts the ability of special districts to levy taxes. The statute has no application here. As discussed, the special assessment is not an ad valorem tax. (*San Marcos Water District v. San Marcos Unified School Dist.* (1986) 42 Cal.3d 154, 161; *Solvang Mun. Improvement Dist. v. Board of Supervisors* (1980) 112 Cal.App.3d 545, 553.) Equally without merit is the contention that the assessment district is a "governmental reorganization" subject to electorate approval. (Rev & Tax. Code, §§ 2263.2, 2298.) A special assessment district is not a legal entity. (*Dawson v. Town of Los Altos Hills*, *supra*, 16 Cal.3d 676, 683.) It is merely a district of land to be benefitted by the improvement. (§ 10008.) Revenue and Taxation Code section 2298 does not apply.

The judgment is affirmed. Hibbs' petition for writ of mandate is denied. City is awarded costs on appeal.

NOT TO BE PUBLISHED.

We concur: YEGAN, J.

STONE, P.J.
GILBERT, J.


Arundell Barranca
Stub Channel
PACIFIC OCEAN
EXHIBIT B

(No Change in Judgment)
NOT FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

ALVIN AGGEN et. al.,	2d Civil No. B102638 (Super. Ct. No. 118395) (Ventura County)
Plaintiffs and Appellants,	ORDER MODIFYING OPINION AND DENYING REHEARING
v.	
CITY OF SAN BUENAVENTURA,	
Defendant and Respondent.	
FLING TRAYLOR et. al.,	(Super. Ct. No. 118544) (Ventura County)
Plaintiffs and Appellants,	Court of Appeal - Second Dist. FILED JUL 18, 1997 JOSEPH A. LANE, CLERK Deputy Clerk
v.	
CITY OF SAN BUENAVENTURA et. al.,	
Defendants and	

Respondents.	)	
	)	
	)	
HARRY R. HIBBS et. al.,	)	(Super. Ct. No. 119484
	)	(Ventura County)
Plaintiffs and Appellants,	)	
	)	
v.	)	
	)	
CITY OF SAN BUENAVENTURA	)	
	)	
Defendants and Respondent.	)	
	)	

THE COURT:

It is ordered that the opinion filed herein on June 19, 1997 be modified in the following particular:

1. On page 4, the first sentence of the second full paragraph beginning with the words "The assessment" and ending with the word "easement" is deleted and the following sentence is inserted in its place:

The city council authorized the assessment district to levy up to $1,680 per year on each of the 299 privately-owned properties.

The petition for rehearing is denied.

No change in judgment.

Second Appellate District,
Division Six, No. B102638
S063192

IN THE SUPREME COURT OF CALIFORNIA

ALVIN AGGEN, Et. Al.,
Appellants

v.

CITY OF BUENAVENTURA,
Respondent

SUPREME COURT
FILED
Sept - 3, 1997
Robert Wandruff Clerk
DEPUTY

Petition for review DENIED.

GEORGE
Chief Justice

Supreme Court, U.S.
FILED
FEB 2 1998
CLERK

No. 97-924

In The

Supreme Court of the United States

October Term, 1997

HARRY R. HIBBS, JESSICA HIBBS, HENRY HOLIDAY,

Petitioners,

vs.

CITY OF SAN BUENAVENTURA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Six

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is Petitioners' Fifth Amendment challenge to California's standard for judicial review of special assessments properly before this Court when: (a) Petitioners did not raise that issue before the trial court; and (b) Petitioners' Fifth Amendment claim was severed from this action?

2. If so, does California's standard for judicial review of special assessments satisfy the Takings Clause when, pursuant to that standard, the record of proceedings before the legislative body must show both that: (a) the assessed properties will receive special benefits from the improvements to be funded by the assessments over and above those received by the general public; and (b) the special assessments are proportional to the benefits to be bestowed on such properties?

3. Did the City comply with the Due Process Clause of the Fourteenth Amendment when, prior to forming the assessment district, the City Council provided extensive notice of the special assessments and held a public hearing at which every affected property owner was given ample opportunity to protest and to testify regarding the proposed assessments?

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APPENDIX

Appendix A — Ruling Of The Superior Court Of The State Of California For The County Of Ventura Dated April 15, 1992 ..... 1a

Appendix B — Order Staying Proceedings Of The Superior Court Of California, County Of Ventura Filed August 26, 1996 ..... 5a

Appendix C — Order Continuing Stay Of Proceedings Of The Superior Court Of California, County Of Ventura Filed December 17, 1997 ..... 6a

Respondent City of San Buenaventura respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the California Court of Appeal's unpublished decision in this case.

OPINIONS BELOW

In addition to the four opinions set forth in the Petition for Writ of Certiorari ("Petition"), the following ruling was issued in this case: the order of the Ventura County Superior Court severing Petitioners' fifth cause of action for inverse condemnation from this suit and consolidating that cause of action with *Adams v. City of San Buenaventura*, Superior Court Case No. 113842. A copy of that ruling is attached hereto as Appendix A ("App. A").

Pursuant to stipulation of the parties, the *Adams* case has been stayed pending final disposition of the appeal in this case. The orders of the Ventura County Superior Court staying the *Adams* case and continuing the stay are attached hereto as Appendices B ("App. B") and C ("App. C"), respectfully.

STATEMENT OF THE CASE

Respondent City of San Buenaventura ("City") presents the following Statement of the Case to supplement that presented by Petitioners Harry R. Hibbs *et al.* ("Hibbs Petitioners" or "Petitioners"). Petitioners' statement contains several inaccurate statements, mischaracterizes the bases for the lower courts' rulings, and conveniently glosses over the trial court's decision to sever their Fifth Amendment takings claim from this action. What follows is a correction of the erroneous statements and a more complete and balanced presentation of the City's actions in forming the assessment district.

A. Petitioners' Property and the Formation of the Assessment District.

This case concerns a challenge to Porto Bello Assessment District No. 91-1 ("assessment district"), formed by the City in 1991 to dredge, repair and maintain the water channels in the Ventura Keys Subdivision. The subdivision consists of 299 waterfront homes built on three navigable, man-made channels ("Keys Channels") located at the base of the Arundell Barranca, a natural drainage which carries rainwater and sediment from hillsides surrounding the City to the Pacific Ocean. Administrative Record (hereinafter "AR"), pp. 2464-65, 2611. Petitioners own homes within the subdivision. Each subdivision lot has an appurtenant, private boat slip and dock easement within the Keys Channels. AR 2610-11, 2648, 2652.

At the time the subdivision application was approved, both the City and the developer recognized that mud and debris from the Arundell Barranca would render the Keys Channels unnavigable unless the waterways were dredged periodically.[1] AR 2464, 2518. Hence, in accepting the grant deed by which the developer dedicated the channels ("Parcel A") to the City, the City expressly reserved the right to levy assessments against the subdivision properties in order to finance the dredging and other channel maintenance work. The grant deed provides:

> Said City of San Buenaventura by its acceptance of this deed reserves all of its rights and privileges which

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1. The record contains no support for Petitioners' bizarre assertion that "[t]he public's construction of the Ventura Marina created [the siltation] problems." Petition at 10. Sedimentation occurs as a result of soil erosion and local geography, which would occur regardless of any action the City has taken. AR 2464-65, 2519-20, 2650, 2660, 2664. As the assessment district engineer's report explains in detail, urbanization in the Arundell Barranca watershed has resulted in a *decrease* of sedimentation in the Keys Channels. AR 2519, 2649-50, 2660-61, 2664.

> it now has or may hereafter have under applicable laws to levy or impose taxes, *assessments*, permits and other charges against the land to which said parcel "A" is adjacent or any parts or portions thereof, for the maintenance and control of the lands transferred to the City hereby.

PR 1358; RA 005 (emphasis added).[2]

Over the years, the City dredged the Keys Channels periodically, using a combination of funds collected from a now defunct maintenance district to which the subdivision property owners contributed, and federal emergency management funds. AR 2367-68. By 1990, the Keys Channels were again in need of dredging and other repairs, and the City Council directed its staff to prepare a proposal for creating an assessment district to finance that work. AR 1-2, 2368. The City retained William Stookey of Willdan Associates, an engineering consultant, to prepare a comprehensive engineer's report analyzing the technical aspects of the proposed assessment district. AR 1, 2769-70. Mr. Stookey had over 40 years of engineering experience and had helped create more than 200 assessment districts. AR 2516, 2655.

The 87-page engineer's report prepared by Mr. Stookey concludes that the dredging and other repair work would confer numerous "special" benefits on Petitioners' properties, beyond those received by the general public. AR 2581-2668. The report states that the proposed improvements would: (1) enable Petitioners to continue using their private easements within the Keys Channels; (2) allow Petitioners to dock boats adjacent to their homes instead

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2. "PR" refers to Appellants' Joint Appendix in lieu of Clerk's Transcript filed by appellants in conjunction with their opening appellate briefs. "RA" refers to Respondent's Appendix filed by the City in conjunction with its brief in opposition to Appellants' Opening Briefs pursuant to California Rule of Court 5.1(f).

of having to rent a boat slip in a marina or use dry storage; (3) provide clear access to the harbor; (4) increase the value of Petitioners' properties; and (5) enhance Petitioners' views, living environment, and other aesthetic values. AR 2652. The report further states that

> maintenance and repair of the rock revetment is a specific benefit to those properties fronting the Ventura Keys waterways. The general public does not benefit from this slope repair activity since all repairs occur within the easements granted for usage to the property owner.

AR 2651.

Mr. Stookey also found that the dredging would provide a limited recreational benefit to the public. His report therefore recommended that 25 percent of the cost of the dredging be borne by the City. AR 2651. The report recommended that the remaining 75 percent of the cost be financed by special assessments on the subdivision properties. Mr. Stookey based this cost allocation on the degree to which the proposed improvements would specially benefit the assessed properties, as compared to the public generally. AR 2651-52. He also determined that the special assessments should be spread equally among the assessed properties, because the special benefits that those properties would receive from the improvements would not vary measurably based on lot size or other factors. AR 2652.

After the engineer's report was prepared, the City Council held a hearing to receive public comment on the report. AR 180-253. At the conclusion of the hearing, the Council adopted a Resolution of Intention to form the assessment district. AR 243-49, 2763-77. Thereafter, the City held two public workshops to answer questions about the engineer's report. AR 2369. On

September 23 and 24, 1991, the City Council held a two-day public "protest" hearing to give affected homeowners an opportunity to testify regarding the proposed assessment district. AR 2508-77, 2799-2887. At the conclusion of the protest hearing, the Council approved the engineer's report, ordered the improvements, and levied the assessments, thereby forming the assessment district.

The assessment district levied an assessment of approximately $1,622 per year on each of the 299 waterfront homes having an appurtenant boat slip and dock easement.[3] AR 2640-47, 2945. In accordance with the engineer's report, the City Council assessed 75 percent of the dredging and repair costs on the property owners, and determined that the remaining 25 percent of the cost would be borne by the City. AR 248-49, 2651, 2778, 2782A, 2783, 2858, 2866-67, 2879-80.

B. Proceedings Below

Shortly after the assessment district was formed, on October 15, 1991, a group of subdivision property owners filed a mandamus action challenging the validity of the assessment district under the caption *Aggen et al. v. City of San Buenaventura* (Ventura County Superior Court Case No. 118395) ("*Aggen*"). PR 4. The initial suit was followed by a second mandamus action filed on October 23, 1991, *Traylor et al. v. City of San Buenaventura* (Ventura County Superior Court Case No. 118544). PR 2292. The trial court consolidated the first two suits on December 23, 1991, under the *Aggen* caption. PR 1566-68.

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3. Petitioners' assert incorrectly that, "[f]or 1991 alone, the special assessment was . . . $9,147.17 [for] each and every homesite. . . ." Petition at 5. While the *total* assessment on each parcel will be approximately $9,147.17, the estimated average *annual* assessment on each parcel is $1,622 and did not exceed $1,680 during the first year. AR 2640-47, 2945; *see also* Petition at 70a (modified opinion of the Court of Appeal).

A third suit was filed by the Hibbs Petitioners on December 24, 1991, *Hibbs et al. v. City of San Buenaventura* (Ventura County Superior Court Case No. 119484). PR 1936. Unlike the other actions, the Hibbs complaint included a cause of action for inverse condemnation under the Fifth Amendment. PR 1945-52. On April 15, 1992, the trial court issued an order that: (1) severed the Hibbs Petitioners' cause of action for inverse condemnation from the other causes of action; and (2) consolidated the remainder of the Hibbs complaint with the ongoing action in *Aggen*. App. A at 1a-2a, 4a. In that same order, the court consolidated the Hibbs Petitioners' Fifth Amendment takings claim with *Adams et al. v. City of San Buenaventura et al.* (Ventura County Superior Court Case No. 113842) ("*Adams*"). App. A at 2a. The *Adams* case is currently before the Ventura County Superior Court, but has been stayed, pursuant to stipulation of the parties, pending final disposition of this action. Apps. B and C.

After extensive briefing and argument, the trial court issued its decision upholding the assessment district. *See* Petition at 1a to 46a (Statement of Decision). The court found that "[t]he Administrative Record supports the City's determination of special benefit to the properties included in [the] 1991 District." Petition at 28a. The court also found that "there is no material dispute over the proportionality of the assessments among the Keys properties," and that the administrative record supports the City's cost allocation. Petition at 32a.

With regard to the standard of review, the court found that the Hibbs Petitioners "essentially, and correctly, *concede* that *Dawson* [*v. Town of Los Altos Hills*, 16 Cal. 3d 676, 129 Cal. Rptr. 97, 547 P.2d 1337 (1976),] applies." Petition at 24a (emphasis added). This Court will note that the trial court's statement of decision does not address Petitioners' new argument that the *Dawson* standard of review violates the Fifth Amendment's Takings Clause, as construed in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1974).

The reason is simple: ***Petitioners did not present their Fifth Amendment challenge to California's standard for judicial review of special assessments to the trial court.***

Petitioners did repeatedly (and improperly) attempt to import their takings arguments into this case, but they did do so in the context of attacking the City Council's special benefit determination, not to challenge the applicable standard of review. The trial court rejected those arguments on the ground that, since the court previously had severed Petitioners' takings claim, the issue was not properly before the court. The court's decision states:

> In effect, petitioners implicitly incorporate the *Adams* case allegations into the *Aggen* cases even though the tort and inverse condemnation issues are to be the subject of a later trial. Petition at 30a.

And:

> As stated above, petitioners' special benefit argument addresses liability issues. Petitioners argue that the City has engaged in misconduct by using the Keys channels as a "debris basin" for the City's drainage system. Similar arguments are repeated in different forms throughout petitioners' points and authorities (Aggen and Hibbs). In fact, . . . petitioners' arguments *usually* touch on liability issues alleged in the *Adams* cases. Petition at 35a-36a (original emphasis).

And again:

> As stated above, the instant *Aggen* mandate cases are separate and distinct from the *Adams* liability cases. The inverse condemnation/nuisance argument may or may not have merit, and the cited *Yue* case may or may

> not be relevant, but the argument does not belong in the instant case. Petition at 36a.

The trial court also flatly rejected Petitioners' claim that the City's assessment district procedures violated the Due Process Clause of the Fourteenth Amendment. Petition at 44a-46a. The court found that "the Administrative Record is filled with substantial evidence of petitioners' participation in hearings, and filing of protests and other materials." Petition at 45a.

In an unpublished opinion, the Court of Appeal affirmed the trial court's decision upholding the assessment district. Petition at 48a-68a (Opinion of the Court of Appeal). The court found that "[t]he engineer's report clearly supports the [City's] finding[s] that the improvement[s] will specially benefit [Petitioners'] propert[ies]," and that "the assessment on each parcel is proportionate to the special benefit enjoyed by each property." Petition at 58a, 61a. With regard to Petitioners' "takings" arguments, the Court of Appeal agreed with the trial court that the issue "does not belong in the instant case" because "[t]he damage claims were severed and [are] not part of the validation action." Petition at 58a. The court also concluded that the Hibbs Petitioners' due process claims were "without merit" because:

> [The] City made the engineer's report available for review 35 days before the protest hearing. Two public workshops were held to respond to questions and consider public comments. At the protest hearing, counsel for the Save the Keys committee was granted an hour to testify and 54 persons addressed the city council. The City council continued the hearing to give everyone an opportunity to speak.

Petition at 66a.

Of the three groups of original plaintiffs, only the Hibbs plaintiffs petitioned the California Court of Appeal for rehearing, and the California Supreme Court for review. The California Court of Appeal denied the petition for rehearing on July 18, 1997. Petition at 69a-70a. The California Supreme Court denied the petition for review on September 3, 1997. Petition at 71a. The City urges this Court to do likewise and put a final end to this clearly meritless litigation, which does not raise a single issue meriting review by this Court.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' FIFTH AMENDMENT CHALLENGE TO CALIFORNIA'S STANDARD FOR JUDICIAL REVIEW OF SPECIAL ASSESSMENTS IS NOT PROPERLY BEFORE THIS COURT BOTH BECAUSE: (1) PETITIONERS DID NOT PRESENT THAT CLAIM TO THE TRIAL COURT; AND (2) PETITIONERS' FIFTH AMENDMENT CLAIM WAS SEVERED FROM THIS ACTION.

Petitioners assert that California's standard for judicial review of special assessments violates the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. Petition at 9-12. However, they present no coherent argument in support of their claim. Instead, Petitioners focus on the particular facts of this case, arguing that, because the City allegedly "caused" the sedimentation problem in the Keys Channels, requiring Petitioners to pay for the channel dredging would effect a "taking" of their property. *See* Petition at 10-11, 13-15.

There are two insurmountable obstacles to this Court's review of Petitioners' takings claim. First, as both the trial court and the

Court of Appeal correctly determined, Petitioners' "takings" arguments do not belong in the instant case, because the trial court has severed the takings claim from this action. App. A at 1a, 4a. Petitioners will have ample opportunity to present their takings arguments in the *Adams* litigation, currently pending before the Ventura County Superior Court. The issue of who or what "caused" the siltation of the Keys Channels will be decided in the *Adams* case. That factual question clearly is not appropriate for resolution in the first instance by this Court.

Second, Petitioners did not raise the issue of whether California's standard for judicial review of special assessments complies with the Takings Clause in the trial court. Consequently, neither the trial court nor the Court of Appeal addressed that issue. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *see also Crawford v. Lungren*, 96 F.3d 380, 389 n.6 (9th Cir. 1996) *cert. denied*, __ U.S. __, 117 S. Ct. 1249, 137 L. Ed. 2d 330 (1997), (the trial court "is not merely a way station through which parties pass by arguing one issue while holding back a host of others for appeal"). Petitioners identify no exceptional circumstance that would justify departure from that general rule, and indeed there is none.

In short, Petitioners' Fifth Amendment claim is not properly before this Court. Even if the claim were properly presented, however, the issue does not even conceivably merit this Court's review for the reasons set forth in Points II and III below.

II.

PETITIONERS' FIFTH AMENDMENT TAKINGS CLAIM DOES NOT MERIT REVIEW BECAUSE: (1) THE FEDERAL STANDARD FOR JUDICIAL REVIEW OF SPECIAL ASSESSMENTS IS WELL SETTLED; AND (2) CALIFORNIA'S STANDARD OF REVIEW IS THE SAME AS THE FEDERAL STANDARD.

California's standard for judicial review of special assessments is consistent with federal court decisions dating back nearly a century. In the seminal case, *Norwood v. Baker*, 172 U.S. 269, 279 (1898), this Court held that special assessments are a valid exercise of a local government's taxation power, provided that: (1) the public improvements to be funded by an assessment will confer "special" benefits on the assessed properties beyond those received by the general public; and (2) the assessment is not in "substantial excess" of the special benefits accruing to such properties. Since that time, the federal courts have uniformly applied the *Norwood* standard in reviewing special assessments. California's standard for judicial review of special assessments is the same as the federal standard.

In *Norwood*, a municipality condemned certain lands for the purpose of opening a street, and then levied assessments against all properties adjoining the new street in order to recover the entire cost of the condemnation proceedings. Plaintiff challenged the special assessments, arguing that they effected a taking of his property in violation of the Fifth Amendment.

First, this Court recognized the long-standing authority of local governments to levy special assessments in order to fund public improvements that provide special benefits to the assessed properties:

> Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property — *such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements.* And according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements.

Norwood, 172 U.S. at 277-78 (emphasis added; citations omitted). The Court noted, however, that the legislature's power to levy special assessments is not unlimited:

> There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. . . .
>
> In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, or private property for public use without compensation. We say "substantial excess," because exact equality of taxation is not always attainable, and for that reason the excess of cost over

> special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment.

Id. at 278-79.

Subsequent federal decisions have confirmed that special assessments do not constitute a taking of private property for public use, so long as the assessments are grounded upon the degree of benefit conferred on the assessed properties. *See, e.g., Myles Salt Co., Ltd. v. Board of Comm'rs of the Iberia and St. Mary Drainage Dist.*, 239 U.S. 478, 485 (1916); *Houk v. Little River Drainage Dist.*, 239 U.S. 254, 265 (1915); *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 344-45 (1901); *Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 96 F.2d 648, 654 (D.C. Cir. 1992); *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610, 614-16 (5th Cir. 1991); *Furey v. City of Sacramento*, 780 F.2d 1448, 1454-55 (9th Cir. 1986). Petitioners do not even bother to discuss this long and unbroken line of authority, nor do they identify a single case that conflicts with the principles announced nearly a century ago in *Norwood*.

California's standard for judicial review of special assessments is essentially the same as the standard established in *Norwood*. Under California law:

> A special assessment finally confirmed by a local legislative body in accordance with applicable law will not be set aside by the courts unless it clearly appears on the face of the record before that body, or from facts which may be judicially noticed, that the assessment as finally confirmed is not proportional to the benefits to be bestowed to the properties to be assessed or that no benefits will accrue to such properties.

Knox v. City of Orland, 4 Cal. 4th 132, 146, 14 Cal. Rptr. 2d 159, 841 P.2d 144 (1992) (quoting and reaffirming the standard of review established in *Dawson v. Town of Los Altos Hills*, 16 Cal. 3d at 685). Pursuant to this standard, special assessments will be upheld by the courts only if the record of proceedings before the legislative body demonstrates that: (1) the improvements to be funded by the assessments will confer a special benefit on the assessed properties; and (2) the assessments are proportional to the benefits received. As the California Supreme Court has made clear, the special benefit that accrues to the assessed property is "the warrant, and the sole warrant, for the legislature itself to impose the burdens of these special assessments." *Spring Street Co. v. City of Los Angeles*, 170 Cal. 24, 30, 148 P. 217 (1915). In addition, the amount of the special assessments must be "proportional to the benefits to be bestowed on the properties to be assessed. . . ." *Dawson*, 16 Cal. 3d at 685. California's standard of "proportionality" plainly is the functional equivalent of *Norwood*'s requirement that the assessments not be in "substantial excess" of the benefits accruing to the properties.

California's standard of review of special assessments is no mere "rubber stamp" on the public entity's actions in forming the assessment district. The California courts have not hesitated to invalidate special assessments where the record fails to demonstrate either that the improvements will confer special benefits on the assessed properties or that the assessments are proportional to the benefits received. *See, e.g., Harrison v. Board of Supervisors of County of San Mateo*, 44 Cal. App. 3d 852, 857-59, 118 Cal. Rptr. 828 (1975) (invalidating special assessments where no substantial evidence of special benefit accruing to the assessed properties); *Costello v. Los Angeles*, 54 Cal. App. 3d 28, 30-32, 126 Cal. Rptr. 462 (1975) (invalidating special assessments where city used an arbitrary method of apportionment).

In this case, however, the evidence of both special benefit and proportionality is overwhelming. Both the trial court and the Court

of Appeal upheld the City's findings of special benefit and proportionality based on the evidence contained in the engineer's report and elsewhere in the administrative record. As the trial court stated: "Facilitating the docking of private boats by owners of waterfront properties is as far from a general public interest as a public improvement can be." Petition at 27a.

In sum, California's standard for judicial review of special assessments is consistent with nearly a century of federal jurisprudence. Petitioners do not even bother to discuss that authority, nor do they identify any conflict in the law governing special assessments, as there is none. Petitioners' Fifth Amendment challenge to California's standard of review therefore does not merit review.

III.

PETITIONERS' FIFTH AMENDMENT TAKINGS CLAIM DOES NOT MERIT REVIEW BECAUSE CALIFORNIA'S STANDARD FOR JUDICIAL REVIEW OF SPECIAL ASSESSMENTS IS CONSISTENT WITH THE PRINCIPLES ANNOUNCED BY THIS COURT IN *NOLLAN* AND *DOLAN*.

Petitioners argue that California's standard for judicial review of special assessments violates the Takings Clause, as construed in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Petition at 9-12. However, unlike *Nollan* and *Dolan*, this case does not present a regulatory takings claim, and Petitioners fail to make any connection between the issues presented here and those arising in the context of land use regulation. Simply put, the formation of an assessment district does not involve the type of "leveraging" or land-use bargaining between property owners and regulatory agencies with which this Court was concerned in *Nollan* and *Dolan*.

However, even assuming *arguendo* that the principles announced in *Nollan* and *Dolan* have some application in the context of special assessment financing, California's standard of judicial review is entirely consistent with those principles.

In both *Nollan* and *Dolan*, the plaintiff landowners were required to dedicate a portion of their property for public use as a condition for approval of a land use permit. *Nollan* held that the Takings Clause requires that there be a reasonable connection or "essential nexus" between the permit condition and the public purpose advanced as the justification for the condition. 483 U.S. at 837. *Dolan* addressed the degree of the required connection and adopted a test of "rough proportionality," requiring the government agency to make "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." 512 U.S. at 391.

California's test for determining the validity of an assessment district comports with the principles announced in *Nollan* and *Dolan*. First, California's standard of review ensures that there is an "essential nexus" between the projects to be funded by special assessments and the properties to be specially assessed; the legislative body must demonstrate on the record that those projects will confer a "special benefit" on the assessed properties. In addition, California's standard of review incorporates the "rough proportionality" test by requiring the legislative body to demonstrate that the amount of the assessments are "proportional" to the benefits accruing to the assessed properties.

Moreover, while one of the principle purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), California's standard of review furthers this purpose by requiring the assessments to be based on special benefit.

As the California Supreme Court has explained, the principle underlying special assessments is that "[t]he general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public." *Knox*, 4 Cal. 4th at 142 (quoting *Solvang Mun. Improvement Dist. v. Board of Supervisors*, 112 Cal. App. 3d 545, 552, 169 Cal. Rptr. 391(1980)).

In sum, California's standard for judicial review of special assessments ensures that the legislative body adheres to the strictures of the Takings Clause. Petitioners' Fifth Amendment challenge to that standard does not merit review.

IV.

PETITIONERS' DUE PROCESS CLAIM DOES NOT MERIT REVIEW BECAUSE BOTH THE TRIAL COURT AND THE COURT OF APPEAL PROPERLY REJECTED THAT CLAIM.

Petitioners argue that the City violated their due process rights under the Fourteenth Amendment by levying the special assessments "without first providing them with notice and a fair and meaningful hearing appropriate to the circumstances." Petition at 13. There is no merit to this contention. The record shows that the City provided extensive notice of the proposed assessment district and gave the affected homeowners ample opportunities to be heard.

On August 19, 1991, the City publicly declared its intention to form the assessment district by taking the following actions. First, the City Council approved a Resolution of Intention to form the assessment district. AR 2768-74. The Resolution of Intention described the projects to be funded by the assessment district and specified the exterior boundaries of the district. AR 2768-74.

Second, the City adopted a resolution setting the time, place, and date for a public hearing to receive comment on the proposed assessment district. AR 2775-77. Third, the City publicized these actions by posting, mailing, and publishing in a newspaper of general circulation notices regarding: (1) the passage of the Resolution of Intention; (2) the boundaries of the proposed assessment district; (3) the amount of the proposed assessments; and (4) the time, place and date of the protest hearing. AR 254-61, 2776.

The City made the engineer's report available for public review at least 35 days prior to the protest hearing. AR 21-24, 198, 2775; *see also* Petition at 66a. The report contains a description of the improvements to be funded by the proposed assessment district, a cost estimate for the improvements, a diagram depicting the exterior boundaries of the assessment district and the specific parcels of land within the district, and an assessment roll showing the costs to be borne by each of the subdivision properties. AR 2598-2605, 2609-13, 2616-47. The report also contains an analysis of the degree to which the proposed improvements would benefit the assessed properties and the public generally. AR 2648-52. On September 12 and 19, 1991, the City held two public workshops to answer questions about the engineer's report. AR 2369. These workshops were purely voluntary on the City's part; no state law required the City to conduct them.

On September 23 and 24, 1991, the City held a public hearing on the proposed assessment district. Petitioners complain that "each homesite owner was only allowed to 'protest' the proposed special assessment by speaking to the city's council for no more than five minutes." Petition at 5. This description grossly mischaracterizes the City's actions. In fact, the City Council allowed an attorney representing Petitioners' interests (counsel for the Save the Keys Committee) to speak for an entire hour. AR 2512, 2535-55. Although, due to time constraints and the large number of people

who wished to speak (54 individuals in all), the Council did limit the homeowners' comments to five minutes each, Petitioners fail to mention that the Council agreed to extend the protest hearing for an additional day in order to give every person in attendance an opportunity to testify. AR 2562, 2799-2887. Under the circumstances, the City provided opportunities for public participation that more than satisfied the requirements of due process. *See Norwood*, 172 U.S. at 296 (assessment district is valid if the affected property owners are given notice and an opportunity to be heard).

Petitioners also complain that the protest hearing was not conducted like a trial, in that "[o]aths were not administered; testimony was not taken; evidence was not received; [and] [t]he homesite owners were not allowed to examine or cross examine witnesses. . . ." Petition at 5. However, Petitioners cite no authority for the proposition that such procedures are required to form an assessment district, which is a legislative act. The cases cited by Petitioners do not involve special assessments and do not remotely demonstrate that Petitioners' due process rights were violated. *See* Petition at 13.

In forming the assessment district, the City thus provided opportunities for public participation that exceeded the requirements of due process. Petitioners' Fourteenth Amendment claim therefore does not merit review.

CONCLUSION

For all the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — RULING OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF VENTURA DATED APRIL 15, 1992

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA

HARRY R. HIBBS, JESSICA HIBBS, HENRY HOLIDAY, VIOLA HOLIDAY, and TAMARA GREEN,

Plaintiff,

vs.

CITY OF SAN BUENAVENTURA,

Defendants.

RULING ON SUBMITTED MATTER:
MOTIONS OF CITY OF SAN BUENAVENTURA FOR SEVERANCE/CONSOLIDATION

The motion of defendant City of San Buenaventura for severance/consolidation of claims came on for hearing on Monday, April 6, 1992 in Courtroom 22 before the Honorable Steven Z. Perren. The case was duly argued whereupon the Court took the matter under submission. The Court now finds and orders:

Severance of Claims: Defendant City of San Buenaventura's motion to sever is granted as follows: Plaintiffs' Fifth Cause of Action of the Complaint for Inverse Condemnation is severed in its entirety from all other causes of action for all purposes. Code of Civil Procedure section 1048(b).

a. Severance of plaintiffs' inverse condemnation claim from its causes of action challenging the formation of the assessment district will facilitate consolidation of plaintiffs' disparate claims into cases with commonality of facts, issues and standards of review.

b. Severance will avoid prejudice that might result from introduction of evidence admissible on one issue, but inadmissible on others.

Consolidation: Inverse Condemnation — Defendant City of San Buenaventura's motion to consolidate plaintiffs' inverse condemnation claim in the fifth cause of action of the complaint with *Adams v. City of San Buenaventura*, Ventura County Superior Court Case No. 113842 is granted as follows: The fifth cause of action of plaintiffs' complaint, in its entirety, in consolidated into the *Adams* case for all purposes, and all future filings on this claim shall be under the title *Adams v. City of San Buenaventura*, Ventura County Superior Court Case No. 113842.

a. Paragraph 47 of the fifth cause of action contains allegations relevant to the issue of damages sustained by plaintiffs as a result of the alleged inverse condemnation of their real property.

b. Plaintiffs' inverse condemnation claim and the *Adams* cases arise from the same events and involve similar facts and issues. Consolidation will (i) avoid relitigation of these issues in multiple cases, (ii) avoid duplicative efforts of the parties and the court in discovery, pre-trial preparation and trial, and (iii) avoid conflicting orders and judgments. Code of Civil Procedure section 1048(a).

c. Plaintiffs will be prosecuting the same issues in the consolidated actions as in their complaint, and there will be no substantial prejudice to plaintiffs from consolidation. Severance of plaintiffs' claims prior to consolidation avoids prejudice to defendant.

ORDER: Plaintiffs shall file a supplemental pleading in the *Adams* case within 10 days, repeating such allegations of their complaint

as necessary, so that the fifth cause of action can be referred to, and stand alone, as a legally sufficient single cause of action. Plaintiffs shall not allege new facts.

ORDER: Defendant shall have 10 days from service of the supplemental pleading to file a supplemental response that can be referred to, and stand alone, as defendant's answer. Defendant shall not allege new defenses.

ORDER: The *Adams* case is reassigned to Judge Edwin M. Osborne, Courtroom 30, for all purposes.

Challenges to Assessment District:

a. Plaintiffs' challenges to the formation of the Porto Bello Assessment District and the *Aggen* cases arose from the same events and involve similar facts and issues. Consolidation will (i) avoid relitigation of these issues in multiple cases, (ii) avoid duplicative efforts of the parties and the court in discovery, pre-trial preparation and trial, and (iii) avoid conflicting orders and judgments. Code of Civil Procedure section 1048(a).

b. Plaintiffs will be prosecuting the same number of issues in the consolidated actions as in their complaint, and there will be no substantial prejudice to plaintiff from consolidation. Severance of plaintiffs' claims prior to consolidation avoids prejudice to defendant.

ORDER: The first, second, third and fourth causes of action of plaintiffs' complaint, in their entirety, are consolidated into the *Aggen* case for all purposes, and all future filings on these claims shall be under the title *Aggen v. City of Ventura*, Ventura County Superior Court Case No. 118395.

Appendix A

ORDER: The file in plaintiffs' action shall be transferred and incorporated into the file for the *Aggen* case. The allegations and prayer of plaintiffs' fifth cause of action are stricken from the complaint.

ORDER: The *Aggen* case is reassigned to Judge Edwin M. Osborne, Courtroom 30, for all purposes.

General:

1. All parties will coordinate their discovery with actions consolidated into theirs so as to avoid duplication of discovery. Counsel for each party will make all documents it has produced in response to written discovery requests (including production of documents) available to all other parties consolidated into an action.

2. Except as otherwise provided by law, witnesses in the consolidated actions may be deposed only on one occasion; however, witnesses who were deposed prior to this consolidation order may be deposed again by the *Hibbs* parties. Deposition testimony of witnesses in each action shall be made available to the other parties consolidated into the action.

DATED: April 15, 1992

s/ Steven Z. Perren
STEVEN Z. PERREN
Judge of the Superior Court

APPENDIX B — ORDER STAYING PROCEEDINGS OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA FILED AUGUST 26, 1996

SUPERIOR COURT OF CALIFORNIA
COUNTY OF VENTURA

CASE NO. 116363 LEAD CASE

(Consolidated with Case Nos. 116363, 116459, 117093, 119484 [5th Cause of Action only], and 121507)

DONALD ADAMS,

Plaintiff,

CITY OF SAN BUENAVENTURA

Defendant.

ORDER STAYING PROCEEDINGS

IT IS HEREBY ORDERED, pursuant to the Stipulation filed on August 8, 1996, that until reactivated by stipulation, motion or order of the Court, the proceedings in these consolidated cases are stayed pending disposition of the appeal of the *Aggen, et al V. City of San Buenaventura, et al.* (Aggen), Ventura County Superior Case No. 118395 (lead case), consolidated with case numbers 118544 and 119484. If not reactivated as described above, these consolidated cases shall automatically be reactivated upon the passage of thirty (30) days from the remittitur of the Aggen appeal. The time within which an action must be brought to trial pursuant to C.C.P. § 583.310 is extended for the period of time within which the stay is effective.

Dated: Aug. 21, 1996

s/ S.P. Chapin
S.P. CHAPIN
Judge of the Superior Court

APPENDIX C — ORDER CONTINUING STAY OF PROCEEDINGS OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA FILED DECEMBER 17, 1997

SUPERIOR COURT OF CALIFORNIA
COUNTY OF VENTURA

CASE NO. 113842 LEAD CASE

(Consolidated with Case Nos. 118363, 118459, 117093, 119484 [5th Cause of Action only], and 121507)

CIV 116363

DONALD ADAMS,

Plaintiff,

CITY OF SAN BUENAVENTURA,

Defendant.

ORDER CONTINUING STAY OF PROCEEDINGS

IT IS HEREBY ORDERED, pursuant to the Stipulation filed on _____, that until reactivated by stipulation, motion or order of the Court, the proceedings in these consolidated cases are stayed pending disposition of the petition for writ of certiorari to the United States Supreme Court filed by Harry R. Hibbs, Jessica Hibbs and Henry Holliday (*Hibbs* petition). The petition was filed in *Aggen, et al. V. City of San Buenaventura, et al.* (*Aggen*), Ventura County Superior Case No. 118395 (lead case), consolidated with case numbers 118544 and 119484. If not reactivated as described above, these consolidated cases shall automatically be reactivated upon the passage of thirty (30) days from the final disposition of the *Hibbs* petition. The time within which an action must be brought

to trial pursuant to C.C.P. § 583.310 is extended for the period of time within which the stay is effective.

Dated: 12/15/97

s/ S.P. Chapin
S.P. CHAPIN
Judge of the Superior Court